Supreme Court, U.S.
FILED

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NO. _____

IN THE

Supreme Court of the United States

MAHER W. SOLIMAN
Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX - VOLUME I

MAHER W. SOLIMAN, JD
1112 LARKIN STREET, SUITE 405
SAN FRANCISCO, CALIFORNIA 94109
TELEPHONE: (415) 776-3998
FACSIMILE: (415) 771-1350

FILED BY: MAHER W. SOLIMAN,JD
PETITIONER IN PROPRIA PERSONA
April 28th, 2003

236 pp

INDEX OF APPENDICES

APPENDIX A: ORDER (The Petition for Rehearing and rehearing en banc is DENIED.) Filed January 3, 2003.

APPENDIX B: OPINION (For Publication United States Court of Appeals for the Ninth Circuit.) Filed November 22, 2002.

APPENDIX C: ORDER (The case will be submitted on briefs and record, without oral argument on August 16, 2002, in San Francisco, California.) Filed July 30, 2002.

APPENDIX D: ORDER (As appellant has corrected the defects of the brief previously noted by the clerk, the motion to file a late opening brief and excerpts of record is granted.) Filed June 21, 2001.

APPENDIX E: ORDER (Appellees' motion to dismiss this appeal for lack of jurisdiction is denied.) Filed April 5, 2001.

APPENDIX F: (1) JUDGMENT IN A CIVIL CASE (United States District Court) Filed January 30, 2001;

(2) ORDER OF DISMISSAL FOR

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (B.A.T.) Filed March 14, 2001;

(3) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company) Filed January 26, 2001;

(4) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (Philip Morris Inc., R.J. Reynolds Tobacco Company, the Council for Tobacco Research - USA, Inc., The Tobacco Institute, and Liggett Group, Inc.) Filed November 15, 2000;

(5) ORDER DISMISSING DEFENDANT PHILIP MORRIS COMPANIES FOR LACK OF PERSONAL JURISDICTION. Filed November 15, 2000;

(6) ORDER. (Granting Dismissal with Leave to Amend to the First Eight

Causes of Actions and Granting Dismissal without Leave to Amend to Plaintiff's Ninth Cause of Action) Filed September 13, 2000; and

(7) ORDER DENYING PLAINTIFF'S MOTION FOR REMAND. Filed July 21, 2000.

APPENDIX G: APPELLANT'S PETITION FOR REHEARING EN BANC (FRAP 35) Filed with United States Court of Appeals for the Ninth Circuit on or about December 2, 2002.

APPENDIX H: Transcript of GEOFFREY C. BIBLE (C.E.O. of Philip Morris Companies) Witness Testimony on March 3, 1998, before Minnesota District Court, Second Judicial District, Ramsey County. It was made part of the record before the Ninth Circuit Court of Appeals and District Court.

APPENDIX I: A FRANK STATEMENT TO CIGARETTE SMOKERS (It was made part of the record before the Ninth Circuit Court of Appeals and District Court.

APPENDIX J: Plaintiff's FIRST AMENDED COMPLAINT FOR DAMAGES EQUITABLE RELIEF (Strict Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty, Fraud, Intentional Misrepresentation, Conspiracy to Commit Fraud and Misrepresentation, and Equitable Relief - Jury Trial Demanded) Filed with the District Court September 14, 2000.

APPENDIX K: RELEVANT STATUTORY PROVISION

APPENDIX L: REPORT OF SPECIAL MASTER: FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS REGARDING NON-LEGGETT PRIVILEGE CLAIMS. Filed with the District Court for the Second Judicial District, State of Minnesota, County of Ramsay on February 10, 1998. It was made part of the record before the Ninth Circuit and the District Court in this Case.

VOLUME I
APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JAN 03 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MAHER W. SOLIMAN, Plaintiff- Appellant, v. PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED, Defendants - Appellees	No. 01-15387 D.C. No. CV-00-1530-MJJ **ORDER**

Before: HALL, KOZINSKI and MCKEOWN, Circuit Judges.

The petition for rehearing en banc is DENIED. Fed. R. App. P. 35, 40.

VOLUME I
APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAHER W. SOLIMAN,
Plaintiff-Appellant,

v.

PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED,
Defendants-Appellees.

No. 01-15387
D.C. No.
CV-00-1530-MJJ
OPINION

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted August 16, 2002*
San Francisco, California

Filed November 22, 2002

Before: Cynthia Holcomb Hall, Alex Kozinski and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Kozinski

*The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY

Torts/Products Liability

The court of appeals affirmed a judgment of the district court. The court held that under California law, a longtime smoker who alleges addiction as an injury may not invoke the "discovery rule" exception to the statute of limitations for product liability claims based solely on the tobacco industry's alleged concealment of information about the harmful effects of smoking.

Appellant Maher Soliman had smoked cigarettes for 32 years, since the late 1960s, when he was 14. He had tried to quit 50 times, but never lasted more than three days. In October 1999, Soliman watched a television interview of a tobacco industry insider who revealed that the industry had suppressed information about the harmful effects of smoking. A few months later, in January 2000, Soliman was diagnosed with respiratory disorders that impaired his lung function and made it hard for him to breathe except in an upright position. Soliman then began to research the industry in earnest. He claimed that, in the course of this research, he made the discovery that smoking was addictive, and that he could not have discovered, prior to viewing the television interview, the addictive nature of nicotine in cigarettes and the health hazards of tobacco, because the tobacco industry had actively and fraudulently concealed and suppressed that information. Soliman sued appellees, various tobacco companies, in California state court in March 2000, seeking $100 million in general and compensatory damages, a further $100 million in punitive damages and equitable relief in the form of a fund to pay his future medical bills. He invoked a number of theories, including product liability, negligence, breach of warranty, fraud, misrepresentation, conspiracy and intentional infliction of emotional distress. The tobacco companies removed to federal court and, once there, moved to dismiss on the ground that the

suit was untimely. The district court denied Soliman's motion to remand to state court and dismissed the complaint as barred by limitations.

Soliman appealed.

[1] Product liability claims are subject to a one-year statute of limitations in California. This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked. The statute of limitations normally begins to run when the claim accrues, that is, when the cause of action is complete with all of its elements. When a plaintiff is unaware of his cause of action, the "discovery rule" may postpone accrual until he either discovers or has reason to discover it. A plaintiff has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements.

[2] Under California law, a plaintiff need not be aware of the specific facts necessary to establish the claim in order for a cause of action to accrue. Nor need he be aware of the particular legal theory that will support it. His claim accrues when, simply put, he at least suspects that someone has done something wrong to him. A smoker who is injured by a product he believed to be safe has reason at least to suspect that its manufacturer or seller has done something wrong. The statute of limitations began to run when Soliman should first have suspected that the tobacco companies' tobacco products had injured him, whether or not he knew of the tobacco companies' wrongful conduct.

[3] The relevant date for purposes of the statute of limitations was not when Soliman knew about the particular injuries that were diagnosed in January 2000, but when he should have known of any significant injury from the tobacco companies' wrongful conduct. [4] If Soliman had actual or constructive knowledge of his addiction before he was diagnosed with respiratory illness, the date of actual or constructive

knowledge of addiction would govern. [5] The date that Soliman actually discovered his addiction would be irrelevant if a reasonable person would have discovered it sooner.

[6] Under California law, addiction is a commonly known risk of smoking and is therefore a danger of which a plaintiff is presumed to be aware. [7] The final question was whether Soliman—presumed by California law to know that smoking causes addiction—had reason to suspect that he himself was addicted.

[8] Soliman knew he was a smoker. Under California law, he was presumed to know that smoking can cause addiction. Even if it were to be assumed that Soliman had no direct evidence of his addiction, he was charged with the obvious inferences he should have drawn about the consequences of his conduct. He may not have had a reason to know for sure that he was addicted until he tried to quit. But he at least should have suspected he had succumbed to that risk at some point during the 32 years that he smoked. A longtime smoker who alleges addiction as an injury may not invoke the discovery rule based solely on the industry's alleged concealment; nicotine's addictiveness is a matter of public record, and addiction is a predictable consequence of using an addictive product. Because Soliman was charged with this knowledge, the district court properly dismissed his complaint as barred by the statute of limitations. The judgment of the district court had to be affirmed.

COUNSEL

Maher W. Soliman, pro se, San Francisco, California, for the appellant.

Alicia J. Donahue and Patrick J. Gregory of Shook, Hardy & Bacon LLP, San Francisco, California, for appellees Philip Morris, Inc., and Phillip Morris Companies, Inc.

W. Bruce Wold and Shelley L. Brittman of Sedgwick, Detert, Moran & Arnold, San Francisco, California, for appellees Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company.

Mary C. Oppedahl of Crosby, Heafey, Roach & May P.C., Oakland, California, for appellee Tobacco Institute, Inc.

Steven H. Bergman and Mary Elizabeth McGarry of Simpson Thatcher & Bartlett, Los Angeles, California, and New York, New York, for appellee B.A.T. Industries p.l.c.

Thomas G. Scarvie and Richard Shively of Howard, Rice, Nemerovski, Canady, Falk & Rabkin P.C., San Francisco, California, for appellee R.J. Reynolds Tobacco Company.

Sharon S. Mequet and Daniel J. Friedman of Loeb & Loeb LLP, Los Angeles, California, for appellee Council for Tobacco Research—U.S.A., Inc.

OPINION

KOZINSKI, Circuit Judge:

Christopher Columbus's log records the first European encounters with tobacco. His crew observed Indians "carrying a charred, hollow wood in their hands and herbs to smoke in this wood, which they are in a habit of doing."[1] Bartolemé de Las Casas, a contemporary who witnessed Columbus's return to Seville, described the consequences:

> These *muskets* as we will call them, they call *tabaco*. I knew Spaniards on this island of Española (San Domingo) who were accustomed to take it, and

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[1] *The Log of Christopher Columbus* 104 (Robert H. Fuson trans., 1987) (entry for Nov. 6, 1492).

> being reprimanded by telling them it was a vice, they made reply that they were unable to cease from using it.[2]

Five centuries later, the Surgeon General came to the same conclusion. In 1988, he formally classified nicotine as addictive, publishing a report whose title, *The Health Consequences of Smoking: Nicotine Addiction*, left little to the imagination.[3] FDA Commissioner David Kessler spent most of the 1990s trying to regulate tobacco products because of the threat that addiction posed to the public health. And, in the fall of 1994, Chandler was berated by Ross, Phoebe and the rest of the gang for his inability to quit.[4] In short, the addictive qualities of tobacco are a cultural fixture, and have been for quite some time.

Plaintiff Maher Soliman nevertheless claims he had no idea that cigarettes were addictive for the first thirty-two years that he smoked them. He says that he did not discover the truth until October 1999, when he saw a television interview of Jeffrey Wigand, the industry insider (so to speak) who made damaging revelations of nicotine manipulation by tobacco companies. Soliman sued the tobacco industry for making him an unwitting slave to the leaf, for demolishing his lungs and for causing him psychological distress. The district court dismissed because it found his claims were barred by the statute of limitations.

1. Soliman alleges that he has smoked cigarettes since the

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[2]Bartolemé de Las Casas, *Historia de las Indias* (1875) (manuscript compiled 1527-1561), *quoted as translated in* Charles Singer, *The Early History of Tobacco*, 219 Q. Rev. 125, 127 (1913).

[3]Public Health Serv., U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking: Nicotine Addiction* (1988) [hereinafter Surgeon General's Report].

[4]*See Friends: The One with the Thumb* (NBC television broadcast, Oct. 6, 1994).

late 1960s, when he was fourteen. He is by now addicted to nicotine. He's tried to quit fifty times, but has never lasted more than three days.[5] At the time he filed his complaint, he was only forty-six but had the lungs of an eighty-five year old. He suffers from a variety of respiratory disorders, including dyspnea and orthopnea, which impair his lung function and make it hard for him to breathe except in an upright position. He claims that smoking has afflicted him with "physical distress, depression, extreme anguish, nervousness, tension, anxiety and loss of sleep." Am. Compl. ¶ 25. And, still, he continues to smoke, unable to quit.

In October 1999, Soliman watched an MSNBC interview of Jeffrey Wigand, who revealed that the tobacco industry had suppressed information about the harmful effects of smoking. A few months later, he was diagnosed with the abovementioned respiratory disorders and began to research the industry in earnest. He claims that, in the course of this research, he made the discovery that's at the center of this lawsuit: Smoking is addictive. "Only then," claims Soliman, "did [he] discover that smoking was . . . an addiction and that he was and is addicted to tobacco product." Am. Compl. ¶ 26. He "could not have discovered, prior to the interview of Mr. Wigand on MSNBC, . . . the addictive nature of nicotine in cigarettes and the health hazards of tobacco, because the tobacco industry ha[d] actively and fraudulently concealed and suppressed" that information. *Id.* ¶ 27. Indeed, Soliman claims, "[t]he addictive nature of nicotine is a defect which is virtually impossible to identify and detect by the consumer." *Id.* ¶ 30.[6]

[5]Soliman's efforts at quitting apparently began only after he learned that tobacco was addictive from watching the Wigand interview in 1999. Why learning that tobacco was addictive suddenly made him want to quit, while years of warning labels disclosing the other serious health risks of smoking did not, is unclear. Nevertheless, on a motion to dismiss, we must assume the truth of these claims.

[6]*Cf. Barber* v. *McDonald's Corp.*, No. 23145/2002 (N.Y. Sup. Ct. filed July 24, 2002), http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf (killer fries).

Soliman sued various tobacco companies in state court in March 2000, seeking $100 million in general and compensatory damages, a further $100 million in punitive damages and "equitable relief" in the form of a fund to pay his future medical bills. He invoked a number of theories, including product liability, negligence, breach of warranty, fraud, misrepresentation, conspiracy and intentional infliction of emotional distress. The thread running through his complaint is that cigarettes cause addiction and other health problems, and defendants must pay for inflicting these ailments upon him.

Defendants removed to federal court and, once there, moved to dismiss on the ground that the suit is untimely. Defendants are skeptical of Soliman's claim that, despite having smoked for thirty-two years, he didn't discover any of his health problems until a few months before he filed. They argue that Soliman had at least constructive knowledge much earlier.

The district court denied Soliman's motion to remand to state court and dismissed the complaint as barred by limitations. Soliman filed an amended complaint, but the district court held that the claims were still untimely and dismissed without leave to amend.

2. Soliman observes that the original removal notice was defective because it wasn't signed by all defendants. The district court, however, allowed defendants to cure this defect by amending the notice pursuant to 28 U.S.C. § 1653. "[A] procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court." *Parrino* v. *FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998).

Soliman also contends there is no complete diversity of citizenship as required by 28 U.S.C. § 1332. Soliman is a citizen of California. None of the named defendants is a citizen of that state, but the complaint lists several "Doe" defendants,

whose "capacities and relationship to other Defendants . . . are unknown" but who are, Soliman claims, "responsible for the acts complained of." Am. Compl. ¶ 14. In his appellate brief, Soliman for the first time identifies one of the mystery defendants—a company in Oakland, California, which he refers to as "DNA Plant Technology Corporation." Soliman claims that this firm genetically engineered a high-nicotine tobacco plant known as "Y-1" for Brown & Williamson, who grew it in Brazil and then secretly shipped it to the United States. He intends to substitute this newly identified co-conspirator for one of the Does.

The citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant. 28 U.S.C. §§ 1441(a), 1447(e) (superseding *Bryant* v. *Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987) (en banc)). Soliman failed to do so before the district court entered judgment against him, and his post-judgment attempt has no jurisdictional significance. *See Bryant* v. *Ford Motor Co.*, 886 F.2d 1526, 1531 (9th Cir. 1989).

3. We therefore reach the central issue—whether Soliman's claims are timely. Because the district court dismissed the case on the pleadings, we can affirm only if untimeliness is apparent on the face of the liberally construed complaint. *See Pisciotta* v. *Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996).

[1] Product liability claims are subject to a one-year statute of limitations in California. Cal. Civ. Proc. Code § 340(3). This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked. *See Nodine* v. *Shiley Inc.*, 240 F.3d 1149, 1153 n.2 (9th Cir. 2001); *Clark* v. *Baxter Healthcare Corp.*, 83 Cal. App. 4th 1048, 1054 n.2 (2000). The statute of limitations normally begins to run when the claim accrues, that is, "when the cause of action is complete with all of its elements." *Nor-*

gart v. *Upjohn Co.*, 21 Cal. 4th 383, 397 (1999); 3 Witkin, *California Procedure* § 459 (4th ed. 1996). When a plaintiff is unaware of his cause of action, the "discovery rule" may postpone accrual until he either discovers or has reason to discover it. *Norgart*, 21 Cal. 4th at 397; 3 Witkin, *California Procedure*, *supra*, § 463. A plaintiff "has reason to discover the cause of action when he has reason at least *to suspect* a factual basis for its elements." *Norgart*, 21 Cal. 4th at 398 (emphasis added).

[2] Soliman argues that the statute of limitations didn't begin to run until he was aware, not only of his injuries, but also of defendants' specific wrongful conduct—in particular, their fraudulent concealment of the health hazards of smoking. But under California law, a plaintiff "need not be aware of the specific 'facts' necessary to establish the claim" in order for a cause of action to accrue. *Jolly* v. *Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988). Nor need he be aware of the particular legal theory that will support it. *Norgart*, 21 Cal. 4th at 397. His claim accrues "when, simply put, he at least 'suspects . . . that someone has done something wrong' to him." *Id.* (quoting *Jolly*, 44 Cal. 3d at 1110). A smoker who is injured by a product he believed to be safe has reason at least to suspect that its manufacturer or seller has done something wrong. *See Nicolo* v. *Philip Morris, Inc.*, 201 F.3d 29, 39 (1st Cir. 2000) ("[Plaintiff] knew her addiction was attributable to defendants. This alone put her on inquiry."); *Arnold* v. *R.J. Reynolds Tobacco Co.*, 956 F. Supp. 110, 117 (D.R.I. 1997) ("[O]nce a plaintiff is aware that he . . . has been injured by a product, [he] has enough information to commence a products liability action based on that injury."). The statute of limitations began to run when Soliman should first have suspected that defendants' tobacco products had injured him, whether or not he knew of defendants' wrongful conduct.[7]

[7]This is not a case like *Snow* v. *A.H. Robins Co.*, 165 Cal. App. 3d 120 (1985), where a plaintiff uses a product knowing that it has a predictable

[3] Soliman also argues that the statute of limitations didn't begin to run until he was diagnosed with dyspnea and orthopnea in January 2000. The relevant date, however, is not when Soliman knew about these particular injuries, but when he should have known of *any* significant injury from defendants' wrongful conduct:

> "[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date."

Nodine, 240 F.3d at 1153 (quoting *Spellis* v. *Lawn*, 200 Cal. App. 3d 1075, 1080-81 (1988)). "[I]f the statute of limitations bars an action based upon harm immediately caused by defendant's wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing" is normally barred. *Miller* v. *Lakeside Vill. Condo. Ass'n*, 1 Cal. App. 4th 1611, 1622 (1991); *see also* 3 Witkin, *California Procedure*, *supra*, § 545. "[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." *Davies* v. *Krasna*, 14 Cal. 3d 502, 514 (1975). Soliman alleges that he suffered a number of significant injuries from the cigarettes

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failure rate. In *Snow*, injury alone did not put the plaintiff on notice of wrongdoing because she knew that the product (an IUD) had a failure rate and reasonably inferred that she was one of the unlucky few. *See id.* at 134. Soliman, by contrast, claims that the tobacco industry assured him cigarettes were not addictive at all. He should have suspected wrongdoing as soon as he had actual or constructive knowledge of his addiction.

he smoked. The injury he should have known about first is the one that starts the statute of limitations.[8]

[4] Soliman alleged addiction as one of his distinct injuries. Am. Compl. ¶ 248. That might conceivably be a cognizable theory of recovery under California law. Tobacco addiction entails physical loss of control and—as any California restaurant-goer can attest—social ostracism. Some putative class actions have been premised entirely on the theory that addiction itself is an injury. *See, e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (noting "addiction as injury" as a "novel theor[y] of recovery"). We need not decide the matter here, however, because Soliman can't claim that his addiction is an appreciable injury and, at the same time, ask us to ignore it in determining when his claim accrued. If Soliman had actual or constructive knowledge of his addiction before he was diagnosed with respiratory illness, the date of actual or constructive knowledge of addiction would govern.

[5] Soliman's complaint doesn't state when in his thirty-two year smoking history he became addicted to nicotine; he contends only that he first "discover[ed]" his addiction while researching the tobacco industry after his January 2000 diagnosis. Am. Compl. ¶ 26. However, the date that Soliman actually discovered his addiction is irrelevant if a reasonable person would have discovered it sooner. *See Norgart*, 21 Cal. 4th at 398. Soliman's constructive knowledge of his own addiction depends to some extent on whether he should have known that smoking is addictive. He alleges that he didn't discover, and couldn't have discovered, the addictive qualities of nicotine before he saw the television program featuring Jeffrey Wigand in October 1999. But the dangers of nicotine addiction have been in the public spotlight for many years.

[8]The date of diagnosis would be irrelevant anyway if the physical symptoms of the disease had manifested themselves at some earlier date. *See Miller*, 1 Cal. App. 4th at 1624-25.

The Surgeon General concluded that nicotine is addictive in 1988, based on the "abundant scientific literature demonstrating that '[c]igarettes and other forms of tobacco are addicting.' " *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 154 (2000) (quoting Surgeon General's Report, *supra*, at 14). He determined that the " 'pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.' " *Id.* (quoting Surgeon General's Report, *supra*, at 15). At congressional hearings in 1994, FDA Commissioner David Kessler testified at length about nicotine's addictive properties. *See Regulation of Tobacco Products (Part 1): Hearings Before the House Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 103d Cong. 28-71 (1994). He noted that more than 15 million Americans try to quit each year and fail. *Id.* at 28. The FDA asserted jurisdiction over tobacco products in 1996 precisely because of their addictive effects. *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (Aug. 28, 1996); *see also Brown & Williamson*, 529 U.S. at 125-26 (acknowledging that tobacco use is "one of the most troubling public health problems facing our Nation today," but holding that the FDA had exceeded its statutory authority). These are hardly obscure details in the historical record.

The California legislature acknowledged some time ago that the inherent risks of smoking are commonly known to the people of the state. In 1987, it enacted an immunity statute that shielded manufacturers and sellers of tobacco products from liability for the commonly known risks of smoking. *See* Act of Sept. 30, 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778-79 (codified at Cal. Civ. Code § 1714.45), *repealed in relevant part by* Act of Sept. 29, 1997, ch. 570, 1997 Cal. Stat. 2838.[9] The California Supreme Court interpreted this

[9]Soliman argues that the immunity statute tolled the statute of limitations while it was in effect. We're skeptical but, at any rate, the California

statute in *Naegele* v. *R.J. Reynolds Tobacco Co.*, 28 Cal. 4th 856 (2002). The plaintiffs in that case alleged that the tobacco industry had "lied about the addictive nature of smoking," "disseminate[d] deceptive . . . statements about the . . . addictive nature of cigarettes," and "control[led] the nicotine content of their cigarettes." *Id.* at 865-66 (internal quotation marks omitted). The court held that the immunity statute barred these claims, reasoning that "[t]hese allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other than those inherent in cigarette smoking" of which the public had a "general understanding." *Id.* at 866 (internal quotation marks omitted). The premise of the immunity statute was that "certain products . . . are 'inherently unsafe,' but . . . the public wishes to have [them] available despite awareness of their dangers." *Id.* at 862 (internal quotation marks omitted); *see also Barker* v. *Brown & Williamson Tobacco Corp.*, 88 Cal. App. 4th 42, 51 (2001) ("Regardless of any concealment by [tobacco companies], it has been a matter of common knowledge since at least 1965 that cigarette smoking is not healthy.").

[6] Under California law, addiction is a commonly known risk of smoking and is therefore a danger of which a plaintiff is presumed to be aware.[10] Because the immunity statute was

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legislature repealed the immunity statute effective January 1, 1998, and Soliman didn't file his complaint until 2000. Any tolling would have done nothing to help Soliman satisfy the one-year deadline. Cal. Civ. Proc. Code § 340(3).

[10]*Naegele* held that certain other risks of smoking, such as those resulting from adulteration of tobacco products with ammonia or other additives, are not inherent in the tobacco product itself and thus are not subject to the immunity statute. 28 Cal. 4th at 865. Soliman alleges that tobacco companies added ammonia to cigarettes, making them more addictive. Am. Compl. ¶¶ 210-211, 224-225. These allegations have no effect on when Soliman's cause of action accrued—the date he knew or should have known of his addiction. *See Norgart*, 21 Cal. 4th at 397; *Jolly*, 44 Cal. 3d at 1111.

repealed in relevant part in 1997, nicotine addiction claims are no longer categorically barred. *See* Act of Sept. 29, 1997, ch. 570, 1997 Cal. Stat. 2838. But they are still subject to limitations. For precisely the same reason a plaintiff couldn't avoid the immunity statute by claiming ignorance of the risk of nicotine addiction, *Naegele*, 28 Cal. 4th at 866, he can't now avoid the statute of limitations based on the same claim.

[7] A smoker may have a timely suit for addiction injury if he didn't become addicted until the year before filing suit. But that's not what Soliman claims; he says only that he didn't *discover* his addiction until recently.[11] The final question, therefore, is whether Soliman—presumed by California law to know that smoking causes addiction—had reason to suspect that he himself was addicted. *See Norgart*, 21 Cal. 4th at 398.

[8] The question answers itself. It's a syllogism that if you are aware that a certain activity carries a risk, and you engage in that activity, you may suffer the consequences of that risk. Replacing "are aware" with "should be aware" doesn't change the logic of this inference. Soliman knew he was a smoker. Under California law, he was presumed to know that smoking can cause addiction. Even if we assume that Soliman had no direct evidence of his addiction, he is charged with the obvious inferences he should have drawn about the consequences of his conduct. *See id.* (a cause of action accrues when the plaintiff "has reason to discover" it). He may not have had a reason to know *for sure* that he was addicted until he tried to quit. But he at least should have *suspected* he had succumbed to that risk at some point during the thirty-two years that he

[11]A plaintiff who doesn't allege that he was injured within the limitations period and instead invokes the discovery rule "concede[s] by implication that, without [the discovery rule], [his] claims are barred." *McKelvey* v. *Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999). Unless Soliman is entitled to the discovery rule for his addiction injury, his complaint is untimely.

smoked. A longtime smoker who alleges addiction as an injury may not invoke the discovery rule based solely on the industry's alleged concealment; nicotine's addictiveness is a matter of public record, and addiction is a predictable consequence of using an addictive product.[12] Because Soliman is charged with this knowledge, the district court properly dismissed his complaint as barred by the statute of limitations.[13]

4. Soliman argues that, whether or not his other claims are untimely, his fraud claim is viable because defendants' fraudulent concealment is a "continuing wrong" that does not finally accrue until defendants disclose the things they are concealing. *See Page* v. *United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984); *Amador Valley Investors* v. *City of Livermore*, 43 Cal. App. 3d 483, 490 (1974). Soliman claims that defendants "still refuse to admit, and *continue* to conceal, the fact that smoking . . . causes disease and that nicotine . . . is addictive." Am. Compl. ¶ 53. That Soliman can make these allegations suggests that the industry's alleged deception is not terribly effective. In any event, even assuming that fraud may be a continuing tort in some circumstances, Soliman has failed to plead it here.

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[12]Because Soliman had constructive knowledge of his addiction more than a year before he filed suit, we need not address defendants' contention that his pleadings are not particular enough to invoke the discovery rule. *See Denholm* v. *Houghton Mifflin Co.*, 912 F.2d 357, 362 (9th Cir. 1990) ("Formal averments or general conclusions to the effect that the facts were not discovered until a stated date, and that the plaintiff could not reasonably have made an earlier discovery, are useless." (internal quotation marks omitted)).

[13] Soliman argues that his claim for equitable relief is governed by laches rather than by the statute of limitations. *See Conti* v. *Bd. of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 359 (1969). But the relief that he seeks—payment of his medical bills—is legal, not equitable, so the doctrine of laches does not apply. *See Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 714 (2002) (" '[A] judgment imposing a merely personal liability upon the defendant to pay a sum of money' " is legal rather than equitable in nature. (quoting *Restatement of Restitution* § 160 cmt. a, at 641-42 (1936))).

A necessary element of a fraud claim is justifiable reliance on the defendant's misrepresentation or omission. *Lazar* v. *Superior Court*, 12 Cal. 4th 631, 638 (1996); 5 Witkin, *Summary of California Law* § 676 (9th ed. 1988). As we have already determined, California law presumes a plaintiff's awareness that smoking causes addiction and other health problems. *See pp. 13-15 supra*. Purported reliance on the industry's failure to disclose those facts is therefore not justifiable. Fraud that "should be apparent even to the plaintiff[ ]" is not actionable. 5 Witkin, *Summary of California Law*, *supra*, § 717; *see also Seeger* v. *Odell*, 18 Cal. 2d 409, 415 (1941) ("If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery."). This rule applies where, as here, "the law . . . assumes one will have . . . knowledge" of the true facts. *See Kahn* v. *Lischner*, 128 Cal. App. 2d 480, 487 (1954). Soliman was presumed to know the things he alleges were concealed from him. His complaint therefore cannot state a continuing fraud claim. *See Pearson* v. *Norton*, 230 Cal. App. 2d 1, 7-8 (1964) (absence of one element of a fraud claim is fatal).

* * *

In light of Soliman's previous failed attempt to amend his complaint, the district court did not abuse its discretion in denying further leave to amend. *See Ascon Props., Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Soliman's suit was properly removed and then properly dismissed.

AFFIRMED.

VOLUME I
APPENDIX C

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JUL 20 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MAHER W. SOLIMAN, Plaintiff- Appellant, v. PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED, Defendants - Appellees	No. 01-15387 D.C. No. CV-00-1530-MJJ **ORDER**

The case will be submitted on the briefs and record, without oral argument, on August 16, 2002, in San Francisco, California. Fed. R. App. P. 34(a)(2).

FOR THE COURT:

Cathy Catterson
Clerk of the Court

By: "s/_____"

Howard Hom
Deputy Clerk

VOLUME I
APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JUN 21 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MAHER W. SOLIMAN,	)
	) No. 01-15387
	)
Plaintiff- Appellant,	) D.C. No.
	) CV-00-1530-
	) MJJ
v.	) Northern
	) California
PHILIP MORRIS INCORPORATED, et al.	)
	)
	) ORDER
Defendants - Appellees	)
	)
	)
----------	)

As appellant has corrected the defects of the brief previously noted by the clerk, the motion to file a late opening brief and excerpts of record is granted. The brief and excerpts received June 19, 2001 shall be filed. The appendix shall be lodged.

The answering brief is due July 19,2001. The optional reply brief is due 14 days from service of the answering brief.

This order was issued prior to the expiration of time within which a response may be filed. Fed. R. App. P. 27(b).

FOR THE COURT:

Cathy Catterson
Clerk of the Court

By: "s/_____"

Cole Benson
Deputy Clerk
Ninth Cir. R. 27-7/
Appendix A,
General Orders for the
United States Court of
Appeals

pro 6.18

VOLUME I
APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed APR 5 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MAHER W. SOLIMAN,	)
	) No. 01-15387
	)
Plaintiff- Appellant,	) D.C. No.
	) CV-00-1530-
	) MJJ
v.	) Northern
	) California
PHILIP MORRIS INCORPORATED, et al.	)
	)
	) ORDER
Defendants - Appellees	)
	)
	)
----------	)

Before: Peter L. Shaw, Appellate Commissioner

Appellees' motion to dismiss this appeal for lack of jurisdiction is denied. *See Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980) (appeal survived absence of Rule 54(b) determination when remaining claims reduced to final judgment during pendency of appeal).

The briefing schedule established March 1, 2001 shall continue to govern this appeal.

"s/_____"
Peter L. Shaw
General Order 6.3(e)

VOLUME I
APPENDIX F

VOLUME I
APPENDIX F-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Filed JAN 30 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN,	)
	) Case Number:
	) C00-1530MJJ
v.	)
	)
PHILIP MORRIS INC, et al.	) JUDGMENT
	) IN A CIVIL
	) CASE
----------	)

IT IS ORDERED AND ADJUDGED
that the Court GRANTS Defendants' motion to dismiss Plaintiff's First Amended Complaint without leave to amend.

By: "s/_____"

Richard Wieking
Deputy Clerk

VOLUME I
APPENDIX F-2

Filed JAN 30 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED ("PHILIP MORRIS, U.S.A."); PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP, INC.; COUNCIL FOR TOBACCO RESEARCH U.S.A., INC.; TOBACCO INSTITUTE, INC.; and DOES SIX through FIFTY, inclusive, Defendants.	) NO. C00-1530MJJ) ORDER OF DISMISSAL

Before the Court is Defendant B.A.T. Industries' ("B.A.T") motion to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. Having considered the moving papers, the Court heard oral argument of counsel on March 13, 2001.

The Court finds, as it did in the ORDER OF

DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, issued on November 15, 2000, that Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have invoked the delayed discovery rule. Therefore, Plaintiff's causes of action based on any injury caused by smoking are barred by the one-year statute of limitations on personal injury actions. Furthermore, despite Plaintiff's attempt to craft an argument to equitably toll the statute of limitations based Defendant's alleged fraudulent concealment, the Court maintains its finding that all of Plaintiff's causes of action are time-barred.

Plaintiff relies on Khan v. Shiley, 217 Cal.App. 3d 848, 855-58 (1990), for the proposition that claims for fraud are distinct from those based on defective products. The statute of limitations for fraud is three years. See, Cal. Code Civil Proc. § 358 (d). The statute accrues upon the discovery, by the aggrieved party, of the facts constituting the fraud. See id. To prove fraudulent concealment, the plaintiff must prove (1) that the defendant fraudulently concealed the plaintiff's cause of action; (2) that the plaintiff did not discover the facts which form the basis of the claim; and (3) that the plaintiff exercised due diligence in attempting to discover the facts which form the basis of the claim. See French & Sons, Inc. v. General Portland, Inc. 885 F.2d 1392, 1399 (9th Cir. 1989).

Here, Plaintiff alleges that B.A.T. and Brown and Williamson became the focus of public controversy "in 1994, when internal documents, authored by both the parent and the subsidiary, were provided to the media and to Congress." (Opp. at 1:13-15.) Therefore, upon discovering the facts creating such public controversy in 1994, Plaintiff was on constructive notice of facts constituting the fraud allegedly committed by Defendant B.A.T. Contrary to Plaintiff's assertion, Defendants in this action are not charging Plaintiff with being on notice of what was transpiring in the decades prior to this public controversy in 1994. (See Opp. at 23:23-24.) Accordingly,

the statute of limitations for fraud began to run in 1994. Plaintiff did not file his Complaint until May 1, 2000.

Plaintiff relies on Castano v. The American Tobacco Co., 961 F. Supp. 953 (E.D. La. 1997), for the proposition that the exercise of reasonable diligence is a question of fact and not a question of law. In Castano, the court addressed when the affirmative defense of prescription under Louisiana law began to run, based on Louisiana case law[1]. Under Louisiana law, prescription does not begin to run against a plaintiff who is ignorant of facts upon which the claim as based as long as ignorance is not reasonable. See Castano, 961 F. Supp. at 957. Here, under California law, it is clear that Plaintiff must allege that he would have been unable to discover his claim despite the exercise of reasonable diligence in order to invoke the delayed discovery rule and toll the applicable statute of limitations. See McKelvey v. Boeing North America, Inc., 74 Cal. App. 4th 151 (1999). Under California law, Plaintiff bears the burden of showing diligence, and conclusory allegations are insufficient to invoke the delayed discovery rule. See McKelvey, 74 Cal. App. 4th at 160. Plaintiff fails to allege that he exercised reasonable diligence in discovering his claims. Therefore, the Court finds that Plaintiff knew, or should have suspected, in 1994 that the Defendant might have engaged in fraudulent conduct.

In French & Sons, Inc. v. General Portland, Inc., also relied on by Plaintiff, the court addressed whether the evidence relied on by the plaintiff to support his contention of fraudulent concealment was sufficient to raise a jury issue, and whether the evidence supported his contention that his failure to discover facts ad his diligence in attempting to discover such facts. See 885 F.2d at 1399. In French & Sons, the court found that the plaintiff had

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[1] Prescription is defined as, "[a] peremptory or perpetual bar to every species of action real or personal, when a creditor has been silent for a certain time without urging his claim." Black's Law Dictionary 1183 (6th ed. 1990), citing Jones v. Butler, 346 So. 2d 790, 791 (1977). Prescription appears to be the Civil Law analogue to the statute of limitation, with the policy based on "the general interest of parties in not being exposed to an action which, if well founded, should have been brought a long time before." Jones, 346 So. 2d at 792, quoting Civil Law Translations, Aubry & Rau Prescription, §771.

sought out the facts to support a potential claim. See id, at 1400. Here, as noted above, Plaintiff has made no allegations that he exercised reasonable diligence in discovering the facts necessary to support his potential claims. Plaintiff also relies on French & Sons for the proposition that the existence of similar claims in prior lawsuits is not tantamount to actual or constructive knowledge that, as a matter of law, a subsequent plaintiff has a viable cause of action. See id. However, Plaintiff is not charged with constructive knowledge of prior lawsuits; he is charged with constructive knowledge of public allegations of the addictive nature of nicotine, and the public controversy surrounding certain Defendant's conduct, which came to public light in 1994.

Finally, Plaintiff relies on Page v. United States, 729 F.2d 818, 821-22 (D.C. Cir. 1984), for the proposition that Defendant's conduct fits within the "continuing wrong" doctrine, whereby the statute of limitations is tolled until the wrongdoing cases. In Page, which involved a claim under the Federal Tort Claims Act, alleging that the Veterans Administration had wrongfully prescribed addictive drugs without proper monitoring over a time span of eight years, the court held that the cause of action did not accrue until the allegedly tortious conduct came to a halt. See, 729 F.2d at 823. The court in Page gave examples of conduct to which the continuing-tort doctrine has been applied.[2] Plaintiff has failed to support his conclusory assertion that Defendant's conduct fits within the ambit of this doctrine. Therefore, the Court finds that the statute of limitations were not tolled based on a continuing tort theory.

On August 29,2000, the Court found that Plaintiff had not pled the requisite discovery facts sufficient to invoke the "delayed discovery rule" under McKelvey v. Boeing North America, Inc., 74 Cal. App. 4th 151, 160

[2] See Page, 729 F.2d 818 at 822. The court noted that the following types of injuries fit within the ambit of the continuing-tort doctrine: (1) physical injury sustained by operation of a jackhammer over a period of 28 years did not accrue until employee was assigned too lighter duties; (2) an employee was allowed to recover for continued assignment to the injury producing post; (3) a prisoner could maintain an action after assault and battery for a continuing failure to provide medical attention.

(1999), therefore, the Court granted Plaintiff leave to file an amended complaint. The Court dismissed Plaintiff's First Amended Complaint on November 15, 2000, as to certain defendants in this action finding that Plaintiff failed to plead sufficient facts to overcome the statute of limitations bar, or that he exercised reasonable diligence in attempting to discover the addictive nature of nicotine, despite the Court's specific instructions. On January 26, 2001, the Court dismissed the complaint as to Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company, for the same reasons. Plaintiff has again failed to allege that he exercised reasonable diligence in discovering his injury, or discovering the fraudulent conduct of Defendant B.A.T. The Court has given Plaintiff notice of the pleading requirements under the law and Plaintiff has repeatedly failed to comply with those requirements.

Plaintiff states the issue quite precisely with regard to his claim of fraudulent concealment, "[t]he question before the court is not when did the plaintiff know about the health risks; the question is when did the plaintiff know about the defendants' misconduct." (Opp. at 23:20-21.) On the face of Plaintiff's motion, he alleges that the controversy over the conduct of various members of the tobacco industry came to public light sometime in 1994. Having failed to allege that he exercised reasonable diligence in discovering this allegedly fraudulent conduct, the Court finds that all of Plaintiff's claims are barred by the applicable statute of limitations. Accordingly, the Court grants Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

Dated: March 13, 2001

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-3

Filed JAN 26 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED, et. al, Defendants.	NO. C00-1530MJJ ORDER OF DISMISSAL

On December 4, 2000, Defendants Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company, filed a motion to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. Having considered the moving papers, the Court heard oral argument of counsel on January 23, 2001.

The Court finds, as it did in the ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, issued on November 15, 2000, that Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have invoked the delayed discovery rule. Therefore, Plaintiff's causes of action are barred by the

one-year statute of limitations on personal injury actions.

Accordingly, the Court hereby GRANTS Defendants' motion to dismiss Plaintiff's First Amended Complaint without leave to amend.

IT IS SO ORDERED.

Dated: January 25, 2001

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-4

FILED 2000 NOV 15
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NO. DIST. OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED, et. al, Defendants.	) NO. C00-1530MJJ) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant Philip Morris Incorporated's motion for dismissal (on behalf of defendants R.J. Reynolds Tobacco Company, the Council for Tobacco Research - U.S.A., Inc., The Tobacco Institute, and Liggett Group, Inc.), pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), for failure to state a claim upon relief can be granted, was heard on November 7, 2000. The Court has read the moving and responding papers and heard the oral argument for counsel. For the reasons set forth below, the Court hereby GRANTS defendants' motion without leave to amend.

I. BACKGROUND

Plaintiff Maher W. Soliman ("Plaintiff") complains of addiction to nicotine and several other conditions allegedly incurred by smoking cigarettes.Plaintiff is a forty-six years old male who has smoked for thirty-two years and has unsuccessfully tried to stop smoking over fifty times. Plaintiff experienced shortness of breath associated with chest pain "on or about January 20, 2000" and was diagnosed with smoking related illness "on or about January26, 2000," including "dyspnea" (an impairment to lung function), "orthopnea" (an inability to breath except in an upright position), premature lung aging, physical distress,depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Upon diagnosis, Plaintiff claims he began investigating the tobacco industry and then learned of the addictive nature of nicotine.

Plaintiff notes several public allegations of the addictive nature of nicotine, including a presentation by Dr. David A. Kessler to the Congressional Subcommittee on Health and the Environment "on or about March 25, 1994," testimony by Dr. Kessler before the Waxman Committee (also in 1994), and a December 1995 article in the Wall Street Journal. Plaintiff does not explain why he was unaware of these allegations prior to his diagnosis.

II. LEGAL STANDARD

A court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for either lack of a congnizable legal theory or the pleading of insufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). Where the facts and dates alleged in the complaint indicate the claim is barred by the statute of limitations, a motion to dismiss for failure to state a claim lies because the action is time-barred. Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980). When deciding upon a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6), a court must take all of the material allegations in plaintiff's complaint as true, and construe them in the light most favorable to plaintiff. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

III. ANALYSIS

A. The "delayed discovery rule"

Defendant Philip Morris Incorporated moves to dismiss for failure to state a claim pursuant to FRCP 12(b)(6) because Plaintiff failed to plead facts that would overcome the one-year statute of limitations bar for personal injury actions set forth in California Code of Civil Procedure ("CCP") §340(3). Under the "delayed discovery rule," a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. McKelvey v. Boeing North American, Inc., 74 Cal. App. 4th 151, 160 (1999).

B. Time and manner of discovery

1. Addiction Injury

Plaintiff's first listed injury is "addiction to the chemical substance nicotine." Plaintiff makes conflicting allegations about when he discovered he was addicted to nicotine -- October 15, 1999 and January 26, 2000. Plaintiff claims such conflicts were made in "error" and tries to explain the "oversight" in his Opposition. This explanation is irrelevant insofar as it attempts to plead facts to support the use of the delayed discovery rule because the new allegations in opposition papers are irrelevant for Rule 12(b)(6) purposes. Schneider v. California Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1988).

Plaintiff relies primarily on the January 26, 2000 date of diagnosis of his addiction and impliedly claims that his addiction was undetectable until this date. However, Plaintiff has been a smoker for thirty-two years and has attempted to quit smoking on several occasions. He has admitted that he thought tobacco was habit-forming, which has been equated with knowing that tobacco was addictive. Insolia v. Philip Morris, Inc., 216 F.3d 596, 603 (7th Cir. 2000). The fact that Plaintiff fails to allege when he first discovered his inability to quit smoking and when he first discovered that tobacco was habit-forming indicates that he failed to meet the heightened McKlvey pleading requirements to invoke the delayed discovery rule

and overcome the statute of limitations bar on his addiction injury.

2. Plaintiff's Other Smoking-Related Injuries

Plaintiff's other 13 injuries include permanent shortness of breath, inability to breath except in the upright position, damage to his lungs, premature aging to his lungs, difficulty breathing, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Amended Complaint ¶24-25. Plaintiff claims he first suffered symptoms of shortness of breath "on or about January 20,2000." All of his injuries were allegedly diagnoses "on or about January 26th, 2000."

Plaintiff reliance on several cases discussing "latent injuries", such as cancer or the asbestos-related disease mesothelioma, to support his theory that the statute of limitations should not begin to run until the diagnosis of an injury is misplaced. Where an injury is not latent, like cancer or mesothelioma, the cause of action will generally accrue on the date that symptoms of the injury appear and not when there is a diagnosis. Goldrich v. Natural Y Surgical Specialties, Inc., 25 Cal. App. 4th 772, 781 (1994). (emphasis added.)

Plaintiff fails to allege when his symptoms first occurred with regard to his physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Plaintiff cannot rely on date of diagnosis because these are not "latent injuries", by the nature of the clinical diagnosis, Plaintiff must have suffered some outward manifestations prior to his diagnosis on January 26, 2000. Plaintiff fails to allege when such outward manifestations first occurred as required by McKelvey, therefore these injuries are time-barred. Plaintiff' s only allegation of when his symptoms first occurred was "on or about January 20, 2000" when he experienced "shortness of breath accompanied with chest pain when situated laying down." This Court has determined that this fails to meet the first prong of the heightened pleading requirement in McKelvey, therefore reliance on the delayed discovery was is unjustified.

3. No allegations of reasonable diligence

Furthermore, in a delayed discovery case, a plaintiff

must also plead facts sufficient to convince the court that delayed discovery was justified. April Enterprises, Inc. v. CTTV, 147 Cal. App. 3d 805, 832 (1983). Plaintiff here cites several authorities in 1994 and 1995 in his Amended Complaint without explaining why he was unaware of such publicity sooner. Plaintiff claims he was not put on notice to investigate the tobacco industry until he was diagnosed in January 2000, relying on the late availability of certain documents collected by Philip Morris and made public on the internet. Opposition , 3:24-12. This does not explain why he was unaware of the other public allegations of the addictive nature of nicotine cited in his Amended Complaint , including a December 1995 article in the Wall Street Journal. Plaintiff failed to specifically plead facts showing that he exercised reasonable diligence in attempting to discover of the addictive nature of nicotine and, therefore, has not met the second prong of the heightened pleading requirements of McKelvey. Plaintiff is not allowed to invoke the delayed discovery rule. The Court finds that all of plaintiff's causes of action based on his personal injuries are time-barred.

IV. ORDER

Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have involved the delayed discovery rule. Therefore, Plaintiff's causes of action, are barred by the one-year statute of limitations on personal injury actions. Based on the foregoing, the Court grants defendants' motion to dismiss for failure to state a claim upon which relief can be granted, without leave to amend.

IT IS SO ORDERED.

Dated: November 13, 2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-5

FILED 2000 NOV 15
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NO. DIST. OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED, et. al, Defendants.	) NO. C00-1530MJJ) ORDER DISMISSING DEFENDANT PHILIP MORRIS COMPANIES FOR LACK OF JURISDICTION

Defendant Philip Morris Companies' motion for dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction was heard on November 7, 2000. The Court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the Court hereby GRANTS defendant's motion.

I. BACKGROUND

Defendant Philip Morris Company ("PMC") is a holding company, with wholly-owned corporate subsidiaries, including Philip Morris Incorporated ("PMI").

PMC does not manufacture, distribute or sell cigarettes or any other product, it does not conduct business in California, and it does not have an office or own property in the state.

II. LEGAL STANDARD

Federal Rule of Civil Procedure ("FRCP") 12(b)(2) allows a defendant to challenge the Court's jurisdiction over the person. Fed. R. Civ. Pro. 12 (b)(2). Once the defendant has challenged the exercise of personal jurisdiction, the plaintiff has the burden of showing that the court has jurisdiction. KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936). Plaintiff failed to carry his burden of showing that this Court may exercise jurisdiction over Philip Morris Companies.

III. ANALYSIS

A. Jurisdiction

A court in California may exercise personal jurisdiction over a non-resident defendant only where the jurisdictional allegations: (1) satisfy California's long-arm statute, and (2) establish that exercising personal jurisdiction over the defendant does not offend the due process clause of the Constitution of California or the United States Constitution. Cal. Code Civ. Proc. §410.10. The due process inquiry has two parts. First, the defendant must have "minimum contacts" with California. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Second, the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." Id.

There are two types of jurisdiction that arise out of a party's "minimum contacts" with the forum - general and specific. General jurisdiction is applicable where defendant's activities in the forum state are "substantial" or "continuous and systematic," even if the cause of action is unrelated to those activities. Data Disc Inc. v. Systems Tech. Assoc., 557 F.2d 1289, 1287 (9th Cir. 1977). Specific jurisdiction is applicable if defendants activities in the forum give rise to, or are related to, the litigation. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

B. There is no basis on which the court may exercise

general jurisdiction over PMC

PMC is a holding company, owning all of the stock of PMI, and PMC does not produce any products or services. PMC is incorporated in Virginia and has its principal place of business in New York. PMC has no employees, offices, or property in California. PMC's only contact with California is in the form of bank accounts with minimal balances. These contacts are not "substantial" or "continuous and systematic" enough to warrant the exercise of general personal jurisdiction over PMC. The Court find that it may not exercise general personal jurisdiction over PMC.

C. There is no basis for the court to exercise specific jurisdiction over PMC

1. Purposeful Availment

Plaintiff asserts the PMC has "purposefully availed" itself of the laws of California based on general allegations about intentional misconduct of PMC and the "effects" of the alleged misconduct in California. However, courts have construed "purposeful availment" to encompass tortious activities that were expressly aimed or purposefully directed at the forum in more than a random, fortuitous, or attenuated way. ESAB Group Inc. v. Centricut, Inc. et al., 126 F.3d 617, 625 (4th Cir. 1997).

Plaintiff conclusory alleges that PMC is "primary participant" in "conducting research and development, designing cigarettes, concealing information on the health hazards of smoking and engaging in a conspiracy with other cigarette manufacturers.....knowing that this conduct would cause smoking-related injuries to smokers wherever Philip Morris cigarettes were sold." Opposition, 11:20-25. First, plaintiff's supporting documentation does not substantiate plaintiff's claims that PMC engaged in this conduct. Even if PMC did engage in this conduct, it was not expressly aimed at the State of California and is too attenuated a basis on which to exercise jurisdiction. Second, California does not recognize conspiracy as a basis for acquiring personal jurisdiction. Mansour v. Super. Ct., 38 Cal. App. 4th 1750, 1760 (1995). These allegations do not give rise to a basis for exercising specific personal jurisdiction.

2. Stream of Commerce

PMC does not manufacture, distribute, or service any goods, materials or products that might enter the "stream of commerce." PMC is merely a holding company of PMI and plaintiff has failed to establish in his supporting documentation that PMC participated in the research and design of cigarettes sold by PMI in California. There is no basis for personal jurisdiction under the stream of commerce theory.

3. Alter Ego Theory

Plaintiff's primary theories supporting the exercise of jurisdiction are that PMC is the "alter ego" of PMI and that PMC exercises control over PMI under traditional principals of agency. Accordingly, he reasons that forum-related activities of PMC's subsidiary, PMI, establish the requisite contact for exercising jurisdiction over PMC. However, in Dymits v. American Brands, Inc, the court held that PMC was "merely a holding company" of PMI and did not "engage in the business of producing tobacco products." No. 96-1897, 1996 WL 75111, at 5 (N.D. Cal. Dec 31, 1996). The court found that the plaintiff failed to show that the subsidiaries of the defendant holding company were established for, or engaged in, activities that, but for the existence of the subsidiaries, the parents would have to undertake themselves. Id. Plaintiff failed to show this relationship between PMC and PMI, and also failed to distinguish the facts in this case from the facts in Dymits.

Plaintiff notes some of the factors used to determine whether a court should "pierce the corporate veil" and consider the subsidiary an alter ego of the parent such as undercapitalization of the subsidiary, disregard of corporate formalities, lack of segregation of corporate records, or an identity of directors and officers. However, plaintiff fails to allege how these factors apply to this case. Plaintiff does not allege that PMI is undercapitalized. PMC and PMI keep separate books and bank accounts and are managed by separate executive officers and boards of directors. Affidavit of Kathleen S. Lampe, 1:28-2:1. The transcript of testimony submitted as "[Second] Judicial Notice in Support of Plaintiff's Opposition" is

irrelevant to PMC's alleged involvement in the activities of PMI because the document itself does not identify PMC's role in PMI's activities. PMC is not the "alter ego" of PMI and should not be subject to jurisdiction based on its status as a holding company of PMI.

D. Plaintiff's Entitlement to Discovery on Jurisdiction

Where a plaintiff's claims of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery. Terracom v. Valley Nat'l Bank, 49 F.3d 555, 562 (9th Cir. 1995). Plaintiff's claim is attenuated and defendant PMC has made specific denials to plaintiff's claim. Defendant's argument against allowing plaintiff to conduct discovery on personal jurisdiction is also persuasive because plaintiff has had access to documents in the Minnesota depository, which were produced in previous litigation, that could have established this Court's jurisdiction over PMC. Plaintiff has had the opportunity to amend his complaint, re-brief the issue, and provide the Court with relevant documents, but has not been able to carry his burden of showing that the Court may exercise jurisdiction over PMC.

IV. ORDER

Based on the foregoing, the Court grants defendant's motion to dismiss for lack of personal jurisdiction.

IT IS SO ORDERED.

Dated: November 9, 2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-6

FILED SEP 13 2000
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Alicia Donahue, SBN 117412
Patrick J. Gregory, SBN 206121
Gabrielle B. Handler, SBN 203733
SHOOK, HARDY & BACON LLP
One Market
Steuart Tower, Ninth Floor
San Francisco, CA 94105
Telephone: (415) 904-6300
Facsimile: (415) 904-6303

Attorneys for Defendant
PHILIP MORRIS INCORPORATED and on behalf of Attorneys for R.J. REYNOLDS TOBACCO COMPANY, THE COUNCIL FOR TOBACCO RESEARCH - USA, INC., THE TOBACCO INSTITUTE, and LIGGETT GROUP, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED, et. al, Defendants.	NO. C00-1530MJJ ~~[PROPOSED]~~ ORDER

On August 29, 2000 at 9:30 a.m., the following motions were set for hearing before the Court:

1. The Motion to Dismiss Plaintiffs' Complaint filed by Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company; and the Council for Tobacco Research - USA, Inc; and joined in by the Tobacco Institute, Inc. and Liggett Group, Inc.;

2. The Motion to Strike Certain Portions of Plaintiff's Complaint filed by (and joined in by) the same defendants referenced in the preceding paragraph;

3. Defendant Philip Morris Companies Inc.'s Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction;

4. Specially Appearing Defendant Brown & Williamson Tobacco Company's Motion to Dismiss Pursuant to Rule 12(b)(4) and (5);

5. Specially Appearing Defendant Lorillard Tobacco Company's Motion to Dismiss Pursuant to Rule 12(b)(4) and (5);

6. Plaintiff's Motion to Substitute Fictitiously Named Defendants.

The Court first considers the Motion to Dismiss Plaintiff's Complaint, as the granting of that motion would effectively eliminate the need to consider the other motions.

Certain Defendants have moved to dismiss all nine of Plaintiff's causes of action on the grounds that those causes of action are barred by the one-year statute of limitations, CCP section 340(3), that is applicable to personal injury actions. Alternatively, Certain Defendants argue that the Fourth, Fifth, Sixth , and Ninth Causes of Action should be dismissed on grounds independent of the statute of limitations.

As to the statute of limitations defense, the Court finds that there are grounds to dismiss all nine causes of

action, as Plaintiff has indicated that he is relying on the discovery rule, and he clearly has not plead the requisite "discovery" facts as required by *McKelvey v. Boeing North American, Inc.*, 74 Cal. App. 4th 151 (1999). Likewise, the Court agrees with Defendants that Plaintiff's Fourth, Fifth, Sixth, and Ninth causes of action have been deficiently plead for reasons independent of the statute of limitations.

With the exception of the Ninth Cause of Action for Intentional Infliction of Emotional Distress, the Court, however, cannot determine at this point whether it is impossible for plaintiff to plead any facts which would correct the deficiencies in his Complaint. Therefore, the Court sustains Defendants' Motion to Dismiss the first eight causes of action, but it grants Plaintiff leave to amend to attempt to replead those eight causes of action so as to overcome the limitations bar. The Court also grants Plaintiff leave to amend to attempt to replead his Fourth, Fifth, and Sixth causes of action so as to cure the additional deficiencies, independent of the statute of limitations, in those particular causes of action. The Court finds that no facts could be plead which would overcome the deficiencies with the Ninth Cause of Action for Intentional Infliction of Emotional Distress, and therefore, that cause of action is dismissed with prejudice.

Because Plaintiff is being allowed to replead his first eight causes of actions, the Court does not, at this time, consider Certain Defendants' Motion to Strike Certain Portions of Plaintiff's Complaint.

The Court next addresses the Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction of Defendant Philip Morris Companies Inc. ("PMC"). Defendant PMC states that it was able to determine that it had, in fact, been properly served with process, and therefore, it withdraws insufficient service of process as a basis for its dismissal. As to PMC's argument that it should be dismissed because the Court does not have personal jurisdiction over it, the Court finds that there are sufficient grounds to grant Defendant PMC's Motion to Dismiss on that basis. Nevertheless, the Court will grant Plaintiff leave to amend to attempt to replead sufficient facts to establish the Court's jurisdiction over PMC.

Finally, the Court addresses the Motion to Dismiss Pursuant to Rule 12(b)(4) and (5) of Specially Appearing Defendant Brown & Williamson Tobacco Company ("Brown & Williamson"); and the Motion to Dismiss Pursuant to Rule 12(b)(4) and (5) of Specially Appearing Defendant Lorillard Tobacco Company ("Lorillard"). The Court finds that Plaintiff clearly has not properly served either of those two moving defendants. Thus, the Court finds basis to grant those motions, but will grant Plaintiff leave to amend to add Brown & Williamson and Lorillard and serve them pursuant to Rule 4. Because of this ruling, the Court need not further consider Plaintiff's Motion to Substitute Fictitiously Named Defendants.

Based upon the foregoing, the Court orders as follows:

1. The Motion to Dismiss Plaintiff's Complaint filed by Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company; and The Council for Tobacco Research - USA, Inc; and joined in by The Tobacco Institute, Inc; and Liggett Group, Inc. is SUSTAINED, and leave to amend is GRANTED to Plaintiff to replead the first eight caused of action of his Complaint.

2. Plaintiff's Ninth Cause of Action for Intentional Infliction of Emotional Distress is DISMISSED with prejudice.

3. Defendant PMC's Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction is DENIED as to the argument that process was insufficient and is SUSTAINED as to the argument that the Court lacks personal jurisdiction over Defendant PMC. Leave to Amend is GRANTED to Plaintiff to attempt to replead facts regarding this Court's jurisdiction over Defendant PMC.

4. The Court also finds grounds to sustain the Motions to Dismiss of Defendant Brown & Williamson and Defendant Lorillard, but Plaintiff is GRANTED leave to amend his Complaint to add those two defendants and to serve them pursuant to Fed. R. Civ. P. 4.

5. Plaintiff's Amended Complaint must be filed no later than twenty days from the date of the hearing on the above referenced motions. If no amended pleading is

filed on or before that date, the Court will dismiss the action with prejudice.

IT IS SO ORDERED.

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-7

FILED JUL 21 2000
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN, Plaintiff, v. PHILIP MORRIS INCORPORATED, PHILIP MORRIS COMPANIES, R.J. REYNOLDS TOBACCO COMPANY, COUNCIL FOR TOBACCO RESEARCH U.S.A., INC., TOBACCO INSTITUTE, INC., and DOES 1 through 40, inclusive, Defendants.	NO. C00-1530MJJ ORDER DENYING PLAINTIFF'S MOTION FOR REMAND

Before the Court is plaintiff Maher W. Soliman's motion to remand. Having read the moving and responding papers, the Court DENIES plaintiff's motion for the reasons set forth below.

I. BACKGROUND AND PROCEDURAL POSTURE

Soliman, a citizen of California, filed suit in the Superior Court of San Francisco on March 28, 2000 against defendants Philip Morris Incorporated ("PMI"), Philip Morris Companies, Inc. ("PMC"), R.J. Reynolds Tobacco

Company ("RJR"), The Council for Tobacco Research - U.S.A., Inc. ("CTR"), and the Tobacco Institute ("TI") in which the plaintiff alleges nine causes of action based upon smoking related injuries.

Defendant PMI is a Virginia corporation with its principle place of business in New York. Defendant PMC is an out-of-state stock holding company incorporated in Virginia with its principle place of business in New York. Defendant RJR is a New Jersey corporation with its principle place of business in North Carolina. Defendant CTR is a dissolved New York corporation concluding its affairs with leased office space in New York. Defendant TI is in the process of dissolving itself as a New York Corporation with its principle place of business in the District of Columbia.

Defendants RJR and CTR were properly served with a copy of the Complaint on March 31, 2000. Defendant PMC was served with plaintiff's complaint on March 31, 2000 and defendant TI was served with the plaintiff's complaint on April 3, 2000. On May 1, 2000, three of the defendants (RJR, PMI and CTR) filed a Notice of Removal to federal court based upon diversity of citizenship. An Amended Notice of Removal in which defendants TI and PMC joined the removal was filed on May 10, 2000. The basis for removal in the Amended Notice of Removal, diversity of citizenship, remained unchanged.

II. LEGAL STANDARD

A party can remove a case to federal court only if the case could be brought in federal court originally. 28 U.S.C. §1441(a). Federal diversity jurisdiction requires both complete diversity of the parties and an amount in controversy exceeding $75,000. See 28 U.S.C. §1332(a).

The party seeking removal bears the burden of showing the propriety of removal. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). In accordance with the law's presumption against removal, the court must resolve any jurisdictional doubts in favor of the party seeking remand. See Gans v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

III. ANALYSIS

Plaintiff asserts that the removal is defective for two

reasons. First, plaintiff maintains that this case does not fall within the Court's federal question jurisdiction. Plaintiff's Reply Memorandum to Defendants Opposition to Plaintiff's Motion for Remand ("Reply") at 2. Second, plaintiff argues that removal is improper because defendants PMC and TI filed an untimely notice of removal and should not be allowed to amend their notice pursuant to 28 U.S.C. §1653. Id.

A. Jurisdiction Based Upon Diversity of Citizenship

Plaintiff argues that removal of this case is improper because the court lacks subject-matter jurisdiction to hear the case since the defendants do not propose a federal question pursuant to 28 U.S.C. §1331. Plaintiff's Memorandum of Points and Authorities in Support of Motion to Remand ("Mem.") at 3. Defendants never propose subject-matter jurisdiction predicated upon a federal question. Rather, defendants' assert that their basis for federal jurisdiction is diversity of citizenship. Defendants Notice of Removal and Request for Jury Trial at 2; Defendants Amended Notice of Removal and REquest for Jury Trial at 2.

A defendant may remove a case that could have been commenced in federal court based on diversity of citizenship. See 28 U.S.C. §1441(b). Under 28 U.S.C. 1332(a), "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between- (1) citizens of different States." However, 28 U.S.C. §1441(b) bars removal of an action on the basis of diversity by a citizen of the forum state. A corporation is deemed a citizen of both the state of its incorporation and the state of its principal place of business. See 28 U.S.C. §1332(c).

Plaintiff alleges in his own complaint that (1) he is a resident of California; (2) all named defendants are corporations or associations located in other states; and (3) he is entitled to $100,000,000 in actual damages. Compl. at 2-3, 31. There is no debate that the requisite diversity of citizenship existed both at the time of suit and the time of removal. This Court holds that the plaintiff has simply failed to consider diversity as a basis for federal

jurisdiction and as a result, finds plaintiff's subject-matter jurisdiction arguments as a basis for remand meritless.

B. Notice of Removal

Plaintiff additionally argues that the case can be remanded because defendants' decision to join TI and PMC to the removal notice occurred after the expiration of the permissible thirty-day amendment period to correct defective allegations of jurisdiction under 28 U.S.C. §1446(b). Reply at 3. As such, the defendants should not be permitted to amend their notice of removal as allowed by 28 U.S.C. §1653.

"The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. §1446(b).

Under 28 U.S.C. §1446(a), all defendants in a state action must join in the petition for removal, except for nominal, unknown or fraudulently joined parties. See Emrich, 846 F.2d at 1193 n.1 (9th Cir. 1988); Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986). "This general rule applies, however, only to defendants properly joined and served in the action." Hewitt, 798 F.2d at 1233; Salverson v. Western States Bankcard Ass'n., 731 F.2d 1423, 1429 (9th Cir. 1984) (noting "a party not served need not be joined" in a petition for removal). Because the right of removal is jointly held by all defendants, the failure of one defendant to join in the notice precludes removal. See Hewitt v. City of Stanton, 789 F.2d 1230, 1232-1233 (9th cir. 1986). "Where fewer than all defendants have joined in a removal action, the removing party has the burden under section 1446(a) to explain affirmatively the absence of any co-defendants in the notice for removal." Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1266 (9th Cir. 1999).

Defendants argue that TI and PMC were not required to join in the original notice of removal or alternatively,

even if they were, amendment of the notice was permitted under 28 U.S.C. §1653 since adding defendants PMC and TI does not add an additional or different basis for jurisdiction. Defendants Memorandum in Opposition to Plaintiff's Motion for Remand ("Opp.") at 2.

In the instant case, the Court finds that TI and PMC were required to join the notice of removal, but that they cured this defect by timely amendment under 28 U.S.C. §1653, or alternatively, pursuant to Federal Rule of Civil Procedure 15(a).

1. Service of Process

Defendants maintain that "unless TI had been properly served as of the date the action was removed (May 1, 2000), it was not required to join the notice of removal." Opp. at 3. Since plaintiff's service of process upon defendant TI was defective, defendants contend, it was not required to join the notice of removal. Id at 3.

A defendant may not be required to take any action in a civil case until proper service has been made, including a requirement that the defendant be forced to consider whether to join in the notice of removal. See Murphy Brothers, Inc. v. Michetti Pipestringing, Inc., 119 S. Ct. 1322, 1327 (1999).[1] Service on a corporation is proper if accepted by: (1) a person designated as an agent to receive process; (2) a corporate officer, i.e., president, vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager; or (3) a person authorized by the corporation to receive service of process. See Cal. Civ. Proc. Code §416.10. The sufficiency of service of process prior to removal from state court is determined under state law. See Lee v. City of Beaumont, 12 F.3d 933, 936-37 (9th Cir. 1993).

Defendants stipulate to the fact that TI is a dissolved corporation, that Debbie Thomas is the Executive Assistant to the Senior Vice President, and that service of process was received April 3, 2000. Opp. at 3-4. Defendants sole contention is that Ms. Thomas is not

[1] But see Teitelbaum v. Soloski, 843 F.Supp. 614, 615 (C.D. Cal. 1994)(a defendant who received a copy of the complaint through improper service may be required to join in the notice of removal reasoning that the 30 -day period for removal begins to run from the date first defendant receives notice).

among the enumerated individuals authorized to accept service of process. Id. at 3-4.

"Despite the language of the Rule, service of process is not limited solely to officially designated officers, managing agents, or agents appointed by law for the receipt of process. The rules are to be applied in a manner that will best effectuate their purpose of giving the defendant adequate notice." Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc. 840 F.2d 685, 688 (9th Cir. 1988).[2] See also Warner Bros. Records, Inc. v. Golden West Music Sales, 36 Cal. App.3d 1012, 1017 (1974) (statutes governing service of process should be liberally construed to effectuate service if actual notice has been received by the defendant noting "[a] specific appointment is not required, but the principal-agent relationship must be close and enduring enough to make it highly probable that the defendant will receive actual notice." (citation omitted)). Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair and reasonable that the defendant will receive actual notice if it is served on the agent. See Warner Bros. Records, Inc. 36 Cal.App.3d at 1017; Direct Mail Specialists, 840 F.2d at 688; Union Asbestos & Rubber Co. v. Evans Prods Co., 328 F.2d 949, 952-53 (7th Cir. 1964) (service on a secretary was held good but the court noted the extenuating circumstances that the defendant was out of the office 75-80% of the time and that the notice was immediately communicated to the defendant).

In Direct Mail, the Ninth Circuit held that service of process on a receptionist in a shared office of defendant corporation and another corporation was deemed proper to create personal jurisdiction. Direct Mail, 840 F.2d at 689. Service of process was made upon a receptionist when she told the process server that she was the only one in the office. The court reasoned that the company was small, presumably the role played by the receptionist was commensurately large in the corporate structure

[2] Rule 4 of the Federal Rules of Civl Procedure and California Civil Procedure Code §416.10 both ennumerate the same entities of a corporation who can be properly served. Accordingly, the Court analogizes here from federal law.

demonstrated by the fact that she was the only employee in the office when the process server arrived, and the defendant received actual notice of receipt a day later from the receptionist. Id. at 688-89.

Following the reasoning of Direct Mail, this Court does not have to reach far in determining service of process upon Ms Thomas was proper. Here, the plaintiff maintains that TI is a "dissolved corporation, has no agent, [no] corporate officer, president, vice president, secretary or a general manager.....[and] Ms. Thomas was served with two copies of the process on April 3, 2000,....[and was] the only individual in the dissolved office." Reply at 8. Ms. Thomas was the only one in the office when served, presumably her role was even more critical than that of a receptionist since she was the executive assistant to a Vice President, and unlike Direct Mail, service occurred in an unshared office space. It is reasonable to believe that Ms. Thomas would promptly deliver the notice to her boss[3] or alternatively, if he had been released from the dissolved corporation, that service upon Ms. Thomas was itself proper. This court holds that on the instant record, service of process was proper, thereby triggering the defendants thirty-day period for filing a removal petition.

2. Nominal Party

Defendants argue that PMC is a nominal party whose inclusion in the notice of removal was not required. Opp. at 4.

Nominal parties need not join in a notice for removal. See 28 U.S.C. §1446(b); Hewitt, 789 F.2d at 1232-33. A defendant is a nominal party where his role is limited to that of a stakeholder or depository. See id, at 1233; Securities and Exch. Comm'n v. Michael Colello, 139 F.3d 674, 676 (9th Cir. 1998)("[t]he paradigmatic nominal defendant is a trustee, agent, or depository....[who is] joined purely as a means of facilitation collection." (citation omitted)). The question of whether or not a named defendant is a nominal party depends on the facs of each case. See Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Presmen and Assistants' Local 349, 427 F.2d 325,

[3] An enumerated corporate. See Cal. Civ. Proc. Code §416.10.

327 5th Cir. 1970). It is unclear whether parent companies per se are nominal parties. See Shaw v. Dow Brands, Inc. 994 F.2d 364, 369 (7th Cir. 1993)(finding Dow Chemical, parent of Dow Brands, did not have to join removal petition).

Contrary to defendants assertion, plaintiff alleges that "both companies [PMC and PMI] were engaged in a joint effort to place the product in a worldwide market, the profits from both companies were dependent on the performance of the other and both companies while maintaining a separate corporate existence, were interdependent."[4] Reply at 7. This Court believes that it would be premature to hold that PMC is a nominal party prior to discovery and therefore finds that PMC should not have been excluded from the original removal notice as a nominal party per se.

3. Amendment Pursuant to 28 U.S.C. §1653

Defendants argue that if the omission of PMC and TI from the original notice of removal was improper, the omission was a non-jurisdictional defect that could be cured by amendment under 28 U.S.C. §1653. Opp. at 5. Plaintiff argues the petition cannot be amended because such defects are fatal and incurable. Reply at 9.

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S. C. §1653. In the Ninth Circuit, as in every federal circuit that has dealt with the question, defects in form of a removal petition are amendable at any time, not just within the original thirty-day period for removal. See Barrow Development Co. v. Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir 1969). Only when defendants attempt to assert totally new grounds for removal or "to create jurisdiction where none existed," will courts deny leave to amend. See Rockwell International Credit Corporation v. United States

[4] In support of their contention that PMC is a nominal party, defendants note that "Judge Wilken of this District has previously determined that, because [PMC] is a stock holding company that has never manufactured, promoted, or sold cigarettes in California, [PMC] is not personally subject to the jurisdiction of a California court." Opp. at 4-5; See Dymits v. American Brands, Inc. WL 751111, *2, 7 (N.D. Cal. 1996). In the face of plaintiff's allegations, however, the Court finds that defendants have failed to proffer evidence sufficient to defeat a motion to remand in light of the law's policy favoring remand.

Aircraft Insurance Group, 823 F.2d 302 (9th Cir. 1987).

The failure to join all defendants in a removal petition may otherwise render the removal petition procedurally defective and thus curable by amendment at any time. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988); Parrino v. FHP, Inc. 146 F.3d 699, 703 (9th Cir. 1988), cert. denied, 119 S. Ct. 510 (1998)(failure of one defendant to join in removal notice until almost two months after service of complaint is a procedural defect that was cured by joinder).

Specifically, the Ninth Circuit in Parrino upheld the addition of a defendant to a notice of removal two months after service of the complaint. See id, at 703. While the plaintiff argued that removal was improper because the procedural requirements for the statute were not satisfied when all required defendants did not join the notice of removal within the required thirty-day statutory period, the court reasoned that remand would be an "empty formality" where the defendant had cured any defect by belatedly joining the notice of removal. See id. at 703.

Parrino dictates denial of the instant motion to remand. Here, defendants seek to add PMC and TI to the notice of removal approximately five weeks after the original service of process, nine days after the expiration of the thirty-day statutory period under §1446(b). In adding TI and PMC to the notice of removal, defendants have kept their basis for removal, diversity, the same. Defendants do not attempt to assert a new ground for removal which would preclude leave to amend. Accordingly, this Court cannot find any evidence on this record as to why the defendants should not be permitted to join defendants PMC and TI in the removal notice.

4. Amendment Pursuant to Rule 15(a)

Defendants argue in passing that amendment is also permitted under Rule 15(a) of the Federal Rules of Civil Procedure since the Amended Notice of Removal was served prior to plaintiff filing his motion to remand. Opp. at 6-7 n.2.

Removal notices are considered pleadings for the purposes of applying Rule 15. See Jones v. City of Buffalo, 867 F.Supp. 1155, 1167 (W.D.N.Y. 1994); Handy v.

Uniroyal, Inc. 298 F.Supp. 301, 305 (D.Del. 1969); Carter v. American Bus Lines, Inc. 22 F.R.D. 323, 326 (D. NEB. 1958)("the word 'pleadings'.....[should not be] restricted to those papers set forth in Rule 7(a)"). Rule 15(a) permits a party to amend a pleading "once as a matter of course at any time before a responsive pleading is served or...at any time within 20 days after it is served" if no responsive pleading is permitted. See Fed. R. Civ. Proc. 15(a). The Rule further states that "[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

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Here, defendants filed their Amended Notice of Removal with this Court on May 10, 2000. Plaintiff filed his Objection to Removal on May 15, 2000. Under Rule 15(a), there is no question that the defendants Amended Notice of Removal was filed prior to the plaintiff's objection. Accordingly, the Court finds that defendants are entitled to amendment pursuant to Rule 15(a), providing an alternate basis for denial of plaintiff's motion to remand.

IV. ORDER

Based on the foregoing, the Court DENIES plaintiff's motion to remand.

IT IS SO ORDERED.

Dated: 7/21/2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX G

No. 01-15387

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAHER W. SOLIMAN, Plaintiff-Appellant, v. PHILIP MORRIS INCORPORATED, et al. Defendants-Appellees.	) NO. 01-15387) DC - CV - 00-01530-MJJ Northern California (San Francisco)

APPEAL FROM THE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARTIN J. JENKINS JUDGE
NORTHERN DISTRICT OF CALIFORNIA
NO. 00-1530-MJJ

APPELLANT'S PETITION FOR REHEARING EN BANC (FRAP 35)

MAHER W. SOLIMAN, JD
1112 LARKIN STREET, NO. 405
SAN FRANCISCO, CALIFORNIA 94109
TELEPHONE: (415)776-3998
FACSIMILE: (415) 771-1350

FILED BY: MAHER W. SOLIMAN
APPELLANT IN PRO PER

I. INTRODUCTION

A. STATEMENT 0F COUNSEL

Pursuant to FRAP 35, petitioner-appellant submits to this Court his PETITION FOR REHEARING EN BANC, because in his judgment, the opinion by Honorable Cynthia Holcomb Hall, Honorable Alex Kozinski and Honorable M. Margaret McKeown on November 22nd, 2002 directly conflicts with an existing opinion by another Court of Appeal and substantially affects a rule of national application in which there is an overriding need for national uniformity.

The opinion directly conflicts with:

(1) Existing opinion by United States Supreme Court in the case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, (1992) [a copy is attached hereto for the Court's convenience as Plaintiff-Appellant's Exhibit A.] and the California Supreme Court in the case of Mangini v. R.J. Reynolds Tobacco Col (1994) 7 Cal.4th 1057, 1066 holding that:

(a) Misrepresentation by false statements - even in "advertising or promotion" - which is based "not on a duty 'based on smoking and health' but rather on a more general obligation - the duty not to deceive." 505 U.S. at pp. 528-529;

(b) Concealment of facts based on a "duty to disclose such facts through channels of communication other than advertising or promotion." Id at p. 528;

(c) Negligence based on "actions unrelated to advertising or promotion," such as negligent "testing or research practices." Id. at pp. 524-525;

(d) Breach of express warranty, which rests not on a "state law" duty but rather on a duty "imposed by the warrantor." Id at pp. 525-537; and

(e) Conspiracy to "misrepresent or conceal material facts," which arises from a "duty not to conspire to commit fraud." Id. at p. 530.

(2) Existing opinion by the California Supreme Court published on or about the same time this case was submitted in the case of Naegele v. R.J.R. Tobacco Company, Case No. S090420, the Court observed: "Section 402A of the Restatement proposes generally that

when a manufacturer or distributor sells a product "in a defective condition unreasonably dangerous to the user or consumer" [citation], and the product reaches that person, as expected and intended, without substantial change in its condition, the seller is 'subject to liability' for physical harm 'thereby caused to the ultimate user or consumer.'" In other words, the Court distinguished between injuries caused by the defective product and injuries that were caused by something not inherent in the product itself that defendants "lied about the addictive nature of smoking." In "a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking." A true copy is attached hereto for the Court's convenience and marked as Plaintiff-Appellant's Exhibit B.

(3) Existing opinion by California Supreme Court in the case of *Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 (allowing fraud claim for misleading television ads about nutritional value of defendant's breakfast cereals.)

(4) Existing opinion by the California Supreme Court in Khan v. Shiley, 217 Cal.App.3d 848, 855-58, 266 Cal, Rptr. 106 (1990), the court stated:

> Product liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects on those products. (Prosser & Keeton, Torts (5th ed. 1984 & sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves.....Unlike the other theories, in which the safety and efficacy of the product is assailed, the fraud claim impugns Defendants' conduct.

(5) Existing opinion by the First Appellate

District, Division Four. appeal docket number A086991 (11/07/01) in the case of Patricia Henley v. Philip Morris Inc. (San Francisco County, Super. Ct. No. 995172); the Court affirmed plaintiff's award of claims for "personal injuries allegedly sustained as a result of defendant's tortious misconduct in the manufacture and marketing of cigarettes" [A true copy is attached hereto for the Court's convenience and marked as Plaintiff-Appellant's Exhibit C.]

Furthermore, this opinion directly contradicts the expressed intent by the California Legislature to repeal the tobacco industry's immunity from personal injury suits provided in Civil Code Section 1714.45 (the "1998 Amendment") because:

> "Evidence has now become available showing tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use."

Thus, the very basis for the 1998 Amendment by the Legislature is recently available evidence concerning the cigarette industry's past conduct.

In enacting the (1998 Amendment) the California Legislature amended Civil Code Section 1714.45 and clearly expressed its intent that personal injury actions were to be allowed based on the cigarette industry's past conduct.

> "(f) It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted a the 1997-98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale or

> consumption of tobacco products. It is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense. Civ. C. §1714.45(f).

This plain language allowing claims by California smokers who "have suffered or incurred injuries, damages or costs" which "were or are brought shall be determined on the merits without the imposition of any claim of statutory bar." Clearly, this opinion is not the result intended by the Legislature.

The opinion further contradicts Rest.2d Torts, 402B; A "public" misrepresentation of "material fact" in "advertising" about the "character or quality of a chattel" creates "liability for physical harm...caused by justifiable reliance on the misrepresentation."

The opinion also contradicts California Business and Professions Code Section 17200 et seq. targets "unfair competition," which is defined as "any unlawful, unfair or fraudulent business act or practice...." and "unfair, deceptive, untrue, or misleading advertising....." including any act prohibited by Business and Professions Code Section 17500 et seq. The California Supreme Court has held that the Legislature, in enacting the unfair competition law, "intended this sweeping language to include anything that can properly be called a business practice and that at the same time is forbidden by law." *See, Stop Youth Addiction Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560. (quotations omitted.) Any business practice that is "unlawful" in the sense that it violates a specific statute may be injoined under Business & Professions Code Section 17203, even though it injures consumers as distinguished from competition. See, *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94. The sale of cigarettes to minors has been a criminal offense in this state since at least 1892, when section 308 of the Penal Code first took effect. Stats. 1891, ch. 70, §1, p. 64.

Section 17200 authorizes a court to hear an action for

relief "upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code §17201. thus, plaintiff-appellant clearly has standing to sue under the Unfair Competition Law on behalf of himself.

The opinion further contradicts Business & Professions Code Section 17500 which makes it unlawful for any person, firm, corporation, or association, or any employee thereof, to make or disseminate or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement is (1) untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto. The prohibition extends to statements in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever. Bus. & Prof. Code §17500.

It is also unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claims, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the products effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact. Bus & Prof. Code §17508(a). A statement is untrue or misleading for purposes of Business and Professions Code Section 17500 if members of the public are likely to be deceived. Actual deception or confusion is not required. Therefore, a violation of the statute is actionable without individualized proof of deception, reliance, and injury. Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.

Finally, as to the timeline, this opinion contradicts

Bus. & Prof. Code §17208, which provides that an action to enforce any cause of action under the Business and Professions Code, Section 17200 et seq. must be commenced within four years after the cause of action accrued.

In addition, Plaintiff-Appellant submits to this Court that in his judgment, the following situations exist:

1. A material point of fact is overlooked in the decision;
2. A material point of law is overlooked in the decision; and
3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

1. A material point of fact is overlooked in the decision

This Court stated at page 9 in the opinion:

> "[1] Product liability claims are subject to a one-year statute of limitations in California. Cal.Civ.Proc. Code §340(3). This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked."

However, plaintiff-appellant's personal injury claims are not based on defective products, rather are caused by defendants' dishonest conduct. Appellant Opening Brief explicitly stated at page 4-5 as follows:

> "Plaintiff claims that this action is NOT based on injuries 'caused by a product' but rather asserts that his injuries were caused by defendants' dishonest conduct."

See also, First Amended Complaint ¶¶268, 283, 285. Indeed, plaintiff's claims for personal injury are based on defendants' dishonest conduct. Defendants Council for Tobacco Research and Tobacco Institute do NOT manufacture, produce, sell or market any product, nonetheless, they are defendants in this case because of their outrageous dishonest conduct.

The issue before the court is NOT when did the plaintiff know about the health risks or discovered the addiction of smoking; the question before the Court is when did the plaintiff discover defendants' misconduct? On or about October 15th 1999, plaintiff discovered defendants' misconduct when it was revealed in the "news" segment on MSNBC. See First Amended

Complaint, paragraph 23. Assuming that plaintiff should have known of defendants' misconduct when the statute first passed on January 1st, 1998, which provides that:

> "Evidence has not become available showing tobacco companies may have deliberately manipulated the level of nicotine , a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use." (Civil Code Section 1714.45)

Plaintiff will still be well within the four year statute of limitations pursuant to Business and Professions Code 17208.

Plaintiff's first amended complaint further alleged breach of specially assumed duty. See First Amended Complaint ¶¶87, 122, 123, 126, 130, 131, 132, 142, 260. The tobacco defendants undertook a duty to protect the public's health by supporting independent research into the safety of tobacco, disclosing the results of that research and refraining from marketing products they knew would cause disease and death. Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes. Regardless of whether the tobacco companies had any duty to speak publicly on the subject, having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth. *Bank of America v. Greenbach*, 98 Cal. App.2d 232 (1950). Not only did defendants willfully fail to perform this duty; they actively conspired to conceal, suppress and distort the scientifically established facts they knew.

2. A material point of law is overlooked in the decision

This Court has overlooked that plaintiff-appellant's claims for Strict Liability, Negligence and Misrepresentation are brought under Section 402-B; his claims for Fraud, Deceit and Fraudulent Concealment are

brought under Bus. & Prof. Code Section 17200 et seq.; and his claims for Breach of Express Warranty, Breach of Implied Warranty and Intentional Misrepresentation by False and Misleading Advertising are brought under Bus. & Prof Code Sections 17500-1572. Furthermore, this Court overlooked that an action to enforce any cause of action under the Business & Professions Code, Section 17200, et seq. must be commenced within four years after the cause of action accrued. Bus & Prof Code Section 17208.

3. An apparent conflict with another decision of the Court which was not addressed in the opinion

This decision of the Court is contradicted by the United States Supreme Court decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-529 (1992), that defendants' advocacy activities can be seen as violations of the "duty not to deceive" which is under Cipollone.

II REPREHENSIBILITY OF DEFENDANTS' CONDUCT

The record fully supports finding that defendants knew by the late 1950's and early 1960's that the nicotine in cigarettes is highly addictive, that substances in cigarette tar cause lung cancer, and that no substantial medical or scientific doubt existed on this crucial fact. Nevertheless, motivated primarily by a professional desire to generate wealth, Philip Morris, in concert with other major tobacco companies, consistently endeavored through calculated misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as plaintiff herein, that cigarettes are neither addictive, nor disease producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge without actually denying it." First Amended Complaint ¶144.

The evidence supports a finding that in 1954, Philip Morris promised in a public announcement, run in over 400 newspapers nationwide, to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers (See the "Frank Statement to Cigarette Smokers" FAC at ¶123). But, to the contrary, Philip Morris and other tobacco companies privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary

lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientists disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.") Plaintiff's First Amended Complaint ¶144.

The record adequately demonstrates that Philip Morris and other tobacco companies publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris and other tobacco companies claim to have been relying on certain technical definitions of the language it used, the tobacco industry intended its publicly and widely disseminated words to be understood in a nontechnical sense, communicating a false impression that the nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer. Addiction by the layman was understood as a habit of addiction which is not an injury in itself, however, addiction as concealed by the tobacco industry was a harmful drug addiction which is severe injury. Such addiction was not known by the average layman of the community prior to 1998.

Information, widely disseminated by tobacco industry provides that tobacco industry's doubt-creating scheme fully succeeded in the case of plaintiff herein an other similarly situated addicted to nicotine in cigarettes. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter through the late 1990's.

Substantial evidence supports a finding that tobacco industry was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Philip Morris and other tobacco manufacturers focused its marketing on children, including the adolescent such as plaintiff herein in the 1960's,

placing advertising where children were more likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

Circumstances surrounding the repeal of California Civi Code §1714.45 (enacted in 1987 and repealed in 1998) suggests some, if not a majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.

III. DEFENDANTS' BREACH OF ASSUMED DUTY
(FAC at ¶¶87, 89)

In this case, plaintiff's First Amended Complaint alleges that defendants' voluntarily assumed special duties by issuing the "Frank Statement to Cigarette Smokers":

"We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

"We always have and always will cooperate closely with those whose task it is to safeguard the public health."

"We are pledging aid and assistance to the research effort into all phases of tobacco use and health." First Amended Complaint ¶123.

Later, defendants published "A Statement About Tobacco and Health":

"We recognize that we have a special responsibility to the public - to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC....We shall continue all possible efforts to bring the facts to light." First Amended Complaint ¶131.

Defendants have re-affirmed these undertakings in various ways over the years. First Amended Complaint ¶¶132, 133, 134, 135, 136, 137.

In making these commitments, defendants assumed duties to plaintiff and to the public in general. Defendants specifically pledged and undertook "a special responsibility to the public" and "accept[ed] an interest in people's health as.....paramount to every other consideration in [their] business." Id.

In accepting these responsibilities, defendants undertook three specific duties. First, by committing themselves to making the people's health their preeminent

responsibility, the tobacco companies agreed that they would not sell or continue to sell products which they knew to cause death and disease when used as intended. The violation of this specially assumed duty is the direct cause of Plaintiff's injuries (See FAC ¶87, 89). Second, defendants pledged to cooperate with those responsible for safeguarding the public's health. In fact, they did the opposite. Third, regardless of whether the tobacco companies had any duty to speak publicly on the subject, having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth. *Bank of America v. Greenbach, supra,* 98 Ca. App. d at 232. Not only did defendants willfully fail to perform this duty, they actively conspired to conceal, suppress and distort the scientifically established facts that they knew.

Defendants reasonably should have foreseen the risk of harm that physical injury to cigarette smokers was not only foreseeable, it was contemplated as the inevitable consequence of a breach of defendants' undertakings. With regard to physical addiction, such injury was intended as defendants manipulated and tampered the nicotine in cigarettes to sustain addiction. The injuries suffered by plaintiff are closely connected with defendants' conduct. Defendants' conduct is morally reprehensible. The tobacco defendants' undertook a duty to protect the public's health by supporting independent research into the safety of tobacco disclosing the results of the research, and refraining from marketing products they knew would cause disease and death. Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes.

This action is for injuries caused by dishonesty and the failure to fulfill commitments. The injury alleged is not an invasion of the right to safe products, but an invasion of the rights to be dealt with honestly and to have commitments performed. See Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992) (liability for fraud is based on a "general obligation - the duty not to deceive"). In short,

the cause of the harm here was the defendants' conduct, not their products. [This point also holds true for the plaintiffs claims that the defendants breached their specially assumed duty to make safety the companies primary concern. Had defendants not undertaken such an obligation (and not committed the other misconduct alleged), section 1714.45 would protect them from liability for marketing products that were inherently unsafe. Having publicly committed themselves to safety, however, and having acted to enhance the danger of their products, defendants invaded the public's and the plaintiff's interests in truthfulness. That legal injury was caused by conduct, not by products.]

The distinction between claims based on dishonest conduct and claims based on defective products is well established in California law. In Khan v. Shiley, 217 Cal.App.3d 848, 855-58, 266 Cal. Rptr. 106 (1990), the court stated:

"Products liability is the name currently given to the area of law involving the liability of those whose supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products. (Prosser & Keeton, Torts (5th ed. 1984 &sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of a defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves....Unlike the other theories, in which the safety and efficacy of the product is assailed, the fraud claim impugns defendants' conduct."

Based on this distinction, the court dismissed the plaintiff's claims for emotional distress based on product liability, but upheld claims based on fraud. See also Westlye v. Look Sports, 17Cal.App. 4th 1715, 1741-1750, 22 Cal. Rptr. 781 (1993) (classifying claims for products liability separately from claims based on misrepresentation); 6 Witkin, supra, Torts, & sect&sect674 et seq., &sect&sect948 et seq., &sect&sect1241 et seq. (addressing liability for fraud in Chapter VI, separate from discussion in Chapters VII and IX of liability for defective

products).

Similar reasoning underlies the Supreme Court's decision in Cipollone v. Liggett Group, Inc. supra, 505 U.S. 504. The plurality held that federal laws mandating warnings on cigarette packages did not preempt state laws permitting recovery for fraud and false advertising. The Court reasoned that the federal statutes only preempted local laws allowing actions "based on smoking and health", and that liability for fraud is predicated "on a more general obligation - the duty not to deceive." Id at 528-29. Similarly, the court found no preemption of claims for a breach of express warranty, based as they were on a voluntary undertaking of the manufacturer. Id. at 525-26; accord, Mangini v. R.J.Reynolds Tobacco Co., 7 Cal. 4th 1057, 1068, 31 Cal. Rptr. 2d 358 (1994) (federal law does not preempt California statute that protects minors from cigarette advertising.)

These results are consistent with section 1714.45(a)(2), which expressly refers to Comment i of Section 402A of the Restatement (Second) of Torts. Comment i explains that a manufacturer escapes liability where the product is inherently unsafe, but is liable if the manufacturer's conduct adds to the danger of a product.

Comment i states, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." Here, defendants are alleged to have added to the danger of cigarettes by deliberately enhancing the addictive quality of nicotine. FAC ¶¶189-233. Thus, section 1714.45 does not protect defendants liability caused by their altered product.

In fact, these exceptions confirm that the Legislature intended to protect inherently unsafe products, but did not intend to immunize misconduct by manufacturers. A breach of an express warranty is an affirmative misrepresentation about the product. A manufacturing defect is a mistake in the manufacturing process that adds to the product's danger. Yet both types of claims fall within the rubric of "product liability actions." See, e.g. *Barker v. Lull Engineering*, 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225 (1978) (manufacturing defect); *Westlye v. Look*

Sports, supra, 17 Cal. App. 4th at 1748 (express warranty). Therefore, to exclude such misconduct from the reach of section 1714.45 required an express exception.

By contrast, while also involving misconduct, allegations of fraud (or breach of an assumed duty) do not fall within the rubric of product liability; they "are in a class by themselves." *Khan,* 217 Cal.App.3d at 857. Therefore, there was no need to name fraud as an exception to section 1714.45's prohibition. In *City and County of San Francisco v. Philip Morris Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product." (Emphasis added.) The Court approvingly cited Khan v. Shiley, which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiff's state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714,45. *City and County of San Francisco, supra,* 957 F.Supp. at 1140. No California appellate court has ruled otherwise.

IV. PLAINTIFF'S CLAIMS ARE GOVERNED BY BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ UNDER THE UNFAIR COMPETITION LAW AND THE FALSE ADVERTISING LAW

Business and Professions Code Section 17200, 17203, and 17204 authorize an action for unfair competition against a person or business that engages in false or misleading advertising. Business and Professions Code Sections 17500-17582 governs false or misleading advertising.

In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197 a group of plaintiffs filed a complaint charging a cereal manufacturer, a retailer, and two advertising agencies with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast cereals. The complaint contained causes of action based on two consumer protection statutes (Bus. & Prof. Code §17200 et seq., unfair competition; and Bus. & Prof. Code ¶17500 et seq., unfair advertising). Defendants

demurrer was sustained without leave to amend by the trial court.

The California Supreme Court reversed and remanded for further proceedings. holding that the complaints stated a cause of action for injunctive relief and restitution under the unfair competition law and the false advertising law. The California Supreme Court stated:

"Plaintiff's second cause of action is based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any 'statement' concerning real or personal property offered for sale, 'which is untrue or misleading, ads which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading,' Bus. & Prof. Code, §17500. Section 17535 authorizes injunctive relief and restitution....Any violation of the false advertising law, moreover, necessarily violates the unfair competition law.

"To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public area are likely to be deceived.' (citations omitted.) Allegations of action deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury if it 'determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice....."

".....Defendants engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation that by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these advertisements were deceptive and misleading, and while we do now know the actual truth of those charges, we must assume them true for the purpose of this appeal.....

".....The California Legislature.....has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive

advertising, regardless of complexity and scale.....

"We therefore conclude that plaintiff's complaint states a cause of action for injunctive relief and restitution under the unfair competition law (Bus. Prof. code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)...." *Committee on Children's Television v. General Foods Corp.* (1984) 35 Cal.3d 197, 210-23.

As in *Committee on Children's Television, supra,* Plaintiffs complaint properly states causes of action based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue and misleading." Bus. & Prof. Code §17500. Plaintiff's complaint requests Equity relief and restitution as authorized by Section 17353.

Plaintiffs complaint alleges that defendants participated in a long-term advertising campaign designed to persuade children to purchase cigarettes (FAC ¶¶234-249) and that these advertisements were deceptive and misleading. This false and unlawful advertising concealed the true facts concerning the health hazards of smoking, the addictive nature of nicotine, and the cigarette manufacturers' manipulation of the levels of nicotine in cigarettes so as to create and sustain addiction in smokers, including minors.

The Unfair Competition Law applies to all deceptive advertising, regardless of complexity and scale. Therefore, plaintiff's complaint states causes of action under the Unfair Competition Law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)

V. BUSINESS AND PROFESSIONS CODE SECTION 17208 GOVERNS THE TIMELINE FOR STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIMS

An action to enforce any cause of action under the Business & Professions Code, Section 17200 et seq. must be commenced within four years after the cause of action accrued. Bus. & Prof. Code §17208.

In Suh v. Yang (N.D. Cal. 1997) 987 F.Supp. 783 the

Court held that competitor's wrongful dilution of a martial arts school operator's service name represented multiple, continuous acts that delayed the accrual of the four-year limitations period applicable to the operator's unfair competition claim under Business and Professions Code Section 17208. The court also noted that the "doctrine of equitable tolling" suspends the running of the statute of limitations if the plaintiff proves that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff acting as a reasonable person, did not know of its existence.

".....Plaintiff's claims for unfair competition would not be barred by the four year statute of limitations since the alleged wrongs.....are multiple, continuous acts, and some of these acts have occurred within the limitations period.....

".....In this case, each allegedly infringing display of Defendant's service name....could create a separate cause of action for unfair competition.....

".....Therefore, Defendants' counter-motion for summary judgment based upon the running of the statute of limitations is DENIED." *Suh v. Yang* (N.D. Cal. 1997) 987 F.Supp. 783, 95-796.

Here, as in *Suh v. Yang, supra,* clearly Plaintiff's causes of action under the unfair competition law (Bus. & Prof. Code §17200 et seq.)

VI. CONCLUSION

For the foregoing reasons,appellants petition for rehearing en banc should be granted. Wherefore, appellant prays for an order of the Court setting aside the judgment and directing the District C ourt to enter a new order accordingly.

December 2nd, 2002

Respectfully submitted:
"s/_____"
Maher W. Soliman, JD
Appellant in Pro Se

U.S. Supreme Court

CIPOLLONE v. LIGGETI GROUP, INC., 505 U.S. 504 (1992)

505 U.S. 504

THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR

OF THE ESTATE OF ROSE D. CIPOLLONE, PETITIONER

v.

LIGGETT GROUP, INC., ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 90-1038

Argued October 8, 1991 Reargued January 13, 1992

Decided June 24, 1992

Section 4 of the Federal Cigarette Labeling and Advertising Act (1965 Act) required a conspicuous label warning of smoking is health hazards to be placed on every package of cigarettes sold in this country, while 5 of that Act, captioned "Preemption," provided: "(a) No statement relating to smoking and health, other than the r 4] statement..., shall be required on any cigarette package," and (b) No [such] statement.., shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with 4. Section *5(b)* was amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act) to specify: No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes

the packages of which are [lawfully] labeled." Petitioner's complaint in his action for damages invoked the District Court's diversity jurisdiction and alleged, inter alia, that respondent cigarette manufacturers were responsible for the 1984 death of his mother, a smoker since 1942, because they breached express warranties contained in their advertising, failed to warn consumers about smoking's hazards, fraudulently misrepresented those hazards to consumers, and conspired to deprive the public of medical and scientific information about smoking, all in derogation of duties created by New Jersey law. The District Court ultimately ruled, among other things, that these claims were preempted by the 1965 and 1969 Acts to the extent that the claims relied on respondents' advertising, promotional, and public relations activities after the effective date of the 1965 Act. The Court of Appeals affirmed on this point.

Held.

The judgment is reversed in part and affirmed in part, and the case is remanded.
893 F.2d 541, reversed in part, affirmed in part, and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that 5 of the 1965 Act did not [505 U.S. 504.505] preempt state-law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. This conclusion is required by the section's precise and narrow prohibition of required cautionary "statement[s]"; by the strong presumption against preemption of state police power regulations; by the fact that the required 4 warning does not, by its own effect, foreclose additional obligations imposed under state law; by the fact that there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of common-law damages

actions; and by the Act's stated purpose and regulatory context, which establish that 5 was passed to prevent a multiplicity of pending and diverse "regulations," a word that most naturally refers to positive enactments, rather than common-law actions. Pp. 517-520.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded in Parts V and VI that *5(b)* of the 1969 Act preempts certain of petitioner's failure-to-warn and fraudulent misrepresentation claims, but does not preempt other such claims or the claims based on express warranty or conspiracy. Pp. 520-530.

(a) The broad language of amended 6 *5(b)* extends the section's preemptive reach beyond positive enactments to include some common-law damages actions. The statutory phrase "requirement or prohibition" suggests no distinction between positive enactments and common law, but, in fact, easily encompasses obligations that take the form of common-law rules, while the phrase "imposed under State law" clearly contemplates common law as well as statutes and regulations. This does not mean, however, that *5(b)* preempts all common-law claims, nor does the statute indicate that any familiar subdivision of common law is or is not preempted. Instead, the precise language of 5(b) must be fairly but - in light of the presumption against preemption - narrowly construed, and each of petitioner's common-law claims must be examined to determine whether it is in fact preempted. The central inquiry in each case is straightforward: whether the legal duty that is the predicate of the common-law damages action satisfies 5(b)'s express terms, giving those terms a fair but narrow reading. Each phrase within the section limits the universe of common-law claims preempted by the statute. Pp. 517-524.

(b) Insofar as claims under either of petitioner's failure-to-warn theories - i.e., that respondents were negligent in the manner that they tested, researched, sold, promoted, and

advertised their cigarettes, and that they failed to provide adequate warnings of smoking's consequences - require a showing that respondents' post-1969 advertising or *[505 U.S. 504, 506]* promotions should have included additional, or more clearly stated, warnings, those claims rely on a state-law "requirement or prohibition.., with respect to... advertising or promotion" within 5(b)'s meaning and are preempted. P. 525-527.

(c) To the extent that petitioner has a viable claim for breach of express warranties, that claim is not preempted. While the general duty not to breach such warranties arises under state law, a manufacturer's liability for the breach derives from, and is measured by, the terms of the warranty. A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement.., imposed under State law" under 5(b). Pp. 525-527.

(d) Because 5(b) preempts "prohibition[s]" as well as "requirement[s]," it supersedes petitioner's first fraudulent misrepresentation theory, which is predicated on a state-law prohibition against advertising and promotional statements tending to minimize smoking's health hazards, and which alleges that respondents' advertising neutralized the effect of the federally mandated warning labels. However, the claims based on petitioner's second fraudulent misrepresentation theory - which alleges intentional fraud both by false representation and concealment of material facts - are not preempted. The concealment allegations, insofar as they rely on a state-law duty to disclose material facts through channels of communication other than advertising and promotions, do not involve an obligation "with respect to" those activities within 5(b)'s meaning. Moreover, those fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not predicated on a duty "based on smoking and health," but rather on a more general obligation - the duty not to deceive. Pp. *527-529.*

(e) Petitioner's claim alleging a conspiracy among respondents to misrepresent or conceal material facts concerning smoking's health hazards is not preempted, since the predicate duty not to conspire to commit fraud that underlies that claim is not a prohibition "based on smoking and health" as that 5(b) phrase is properly construed. P. 530.

JUSTICE BLACKMIJN, joined by JUSTICE KENNEDY and JUSTICE SOUTER, concluded that the modified language of *5(b)* in the 1969 Act does not clearly exhibit the necessary congressional intent to preempt state common law damages actions, and therefore concurred in the judgment that certain of petitioners failure to warn and fraudulent misrepresentation claims, as well as his express warranty and conspiracy claims, are not preempted by Act. P. 533-534.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that all of petitioner's common law claims are preempted by the 1969 Act under ordinary principles of statutory construction, and therefore concurred in the judgment that certain of his post-1969 failure-to-warn claims [505 U.S. 504, *507]* and certain of his fraudulent misrepresentation claims are preempted. P. 548.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REUNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY; and SOUTER, JJ., joined, and an opinion with respect to Parts V and VI, in which REUNQUIST, C.J., and WHITE and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which KENNEDY and SOUTER, JJ., joined, post, p. 531. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, post, p. 544.

Laurence H. Tribe reargued the cause for petitioner. Marc

Z. Edell argued the cause for petitioner on the original argument. with them on the briefs was Alan M. Darnell.

H. Bartow Farr III reargued the cause for respondents. With him on the briefs was Richard G. Taranto. *

[Footnote *] Briefs of amici curiae urging reversal were filed for the State of Minnesota et al. by Hubert H. Humphrey III, Attorney General of Minnesota, and Peter M. Ackerberg, Special Assistant Attorney General, and by the Attorneys General for their respective State as follows: James H. Evans of Alabama, Grant Woods of Arizona, Richard Blumenthal of Connecticut, Larry EchoHawk of Idaho, Michael E. Carpenter of Maine, Frankie Sue Del Papa of Nevada, Robert J. Del Tufo of New Jersey, Tom Udall of New Mexico, Nicholas J. Spaeth of North Dakota, Lee Fisher of Ohio, and Kenneth 0. Elkenberry of Washington; for the American Cancer Society et al. by Alan B. Morrison, David C. Vladeck, and Comish F. Hitchcock; for the American College of Chest Physicians by Raymond D. Cotton and Sherman S. Poland; for the American Medical Association by Kirk B. Johnson; for the Association of Trial Lawyers of America by Jeffrey Robert White and Michael C. Maher; for the National League of Cities et al. by Richard Ruda; for Six Former Surgeons General of the United States et al. by S. Stephen Rosenfeld and Richard A. Daynard; and for Trial lawyers for Public Justice, P.C., by Charles S. Siegel and Arthur Bryant.

Briefs of amici curiae urging affirmance were filed for the Association of National Advertisers, Inc., by Burt Neuborne

and Gilbert H. Weil; for the National Association of Manufacturers by Diane L. Zimmerman, Jan 5. Amundson, and

Quentin Riegel; and for the Product Liability Advisory Council, Inc., by Kenneth S. Geller and Mark I. Levy. [505 U.s.

504, 508]

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI.

"WARNING: THE SURGEON GENERAL HAS

DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH."

A federal statute enacted in 1969 requires that warning (or a variation thereof) to appear in a conspicuous place on every package of cigarettes sold in the United States. 1 The questions presented to us by this case are whether that statute, or its 1965 predecessor which required a less alarming label, preempted petitioner's common-law claims against respondent cigarette manufacturers.

Petitioner is the son of Rose Cipollone, who began smoking in 1942 and who died of lung cancer in 1984. He claims that respondents are responsible for Rose Cipollone's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Court of Appeals held that petitioner's state-law claims were preempted by federal statutes, 893 F.2d 541 (CA3 1990), and other courts have agreed with that analysis. 2 The highest court of the State New Jersey, however, has held that the federal statutes *[505 U.S. 504,509]* did not preempt similar common-law claims. 3 Because of the manifest importance of the issue, we granted certiorari to resolve the conflict, 500 U.S. 499, 935 (1991). We now reverse in part and affirm in part.

I

On August 1, 1983, Rose Cipollone and her husband filed a complaint invoking the diversity jurisdiction of the Federal District Court. Their complaint alleged that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by the three respondents. After her death in 1984, her husband filed an amended complaint. After trial, he also died; their son, executor of both estates, now maintains this action.

Petitioner's third amended complaint alleges several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort. These claims, all based on New Jersey law, divide into five categories. The "design defect claims" allege that respondents' cigarettes were defective because respondents failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created (Count 2, App. 83-84). The "failure to warn claims' allege both that the product was defective as a result of [respondents'] failure to provide adequate warnings of the health consequences of cigarette smoking" (Count 3, App. *85)* and that respondents "were negligent in the manner [that] they tested, researched, sold, promoted and advertised" their cigarettes (Count 4, App. 86). The "express warranty claims" allege that respondents had "expressly *[505* U.S. 504, 510] warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences"(Count 7, App. 88). The "fraudulent misrepresentation claims" allege that respondents had willfully, "through their advertising, attempted to neutralize the [federally mandated] warnin[g]" labels (Count 6, App. 87-88), and that they had possessed, but had "ignored and failed to act upon," medical and scientific data indicating that "cigarettes were hazardous to the health of consumers" (Count 8, App. 89). Finally, the "conspiracy to defraud claims" allege that respondents conspired to deprive the public of such medical and scientific data (ibid.).

As one of their defenses, respondents contended that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct after 1965. In a pretrial ruling, the District Court concluded that the federal statutes were intended to establish a uniform warning that would prevail throughout the country, and that would protect

cigarette manufacturers from being "subjected to varying requirements from state to state," Cipollone v. Liggett Group, Inc., 593 F.Supp. 1146, 1148 (N.J. 1984), but that the statutes did not preempt common-law actions. Id., at 1153-1170. 4 Accordingly, the court granted a motion to strike the preemption defense entirely. [505 U.S. 504,511]

The Court of Appeals accepted an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and reversed. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (CA3 1986). The court rejected respondents' contention that the federal Acts expressly preempted common-law actions, but accepted their contention that such actions would conflict with federal law. Relying on the statement of purpose in the statutes, 5 the court concluded that Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy" would be upset by state-law damages actions based on noncompliance with "warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act." Id., at 187. Accordingly, the court held:

"[T]he Act pre-empts those state law damage[s] actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. [W]here the success of a state law damage[s] claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act." Ibid. (footnote omitted).

[505 U.S. 504, 512]

The court did not, however, identify the specific claims asserted by petitioner that were preempted by the Act.

This Court denied a petition for certiorari, 479 U.S. 1043 (1987), and the case returned to the District Court for trial. Complying with the Court of Appeals, mandate, the District Court held that the failure-to-warn, express warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims were barred to the extent that they relied on respondents' advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act). 649 F.Supp. 664, 669, 673-675 (N.J. 1986). The court also ruled that, while the design defect claims were not preempted by federal law, those claims were barred on other grounds 6 Id_ at 669-672. Following extensive discovery and a 4-month trial, the jury answered a series of special interrogatories and awarded $400,000 in damages to Rose Cipollone's husband. In brief, it rejected all of the fraudulent misrepresentation and conspiracy claims, but found that respondent Liggett had breached its duty to warn and its express warranties before 1966. It found, however, that Rose Cipollone had "involuntarily and unreasonably encounter[ed] a known danger by smoking cigarettes," and that 80% of the responsibility for her injuries was attributable to her. See 893 F.2d, at *554* (summarizing jury findings). For that reason, no damages were awarded to her estate. However, the jury awarded damages to compensate her husband for losses caused by respondents' breach of express warranty.

On cross-appeals from the final judgment, the Court of Appeals affirmed the District Court's preemption rulings, but remanded for a new trial on several issues not relevant to our decision. We granted the petition for certiorari to consider the preemptive effect of the federal statutes. [505 U.S. 504,513]

II

Although physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. See U.S. Dept. of Health and Human Services, Report of the

Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress 5 (1989). The ensuing decades saw a wide range of epidemiologic and laboratory studies on the health hazards of smoking. Thus, by the time the Surgeon General convened an advisory committee to examine the issue in 1962, there were more than 7,000 publications examining the relationship between smoking and health. Id., at 5-7.

In 1964, the advisory committee issued its report, which stated as its central conclusion; "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964). Relying in part on that report, the Federal Trade Commission (FTC), which had long regulated unfair and deceptive advertising practices in the cigarette industry, 7 promulgated a new trade regulation rule. That rule, which was to take effect January 1, 1965, established that it would be a violation of the Federal Trade Commission Act "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325 (1964). Several States also moved to regulate the advertising and labeling of cigarettes. See, e.g., 1965 N.Y. Laws, ch. 470; see also 111 Cong.Rec. 13900-13902 (1965) (statement of Sen. Moss). Upon a congressional request, the FTC postponed enforcement of its *[505* U.S. 504,514] new regulation for six months. In July, 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (1965 Act or Act). 8 The 1965 Act effectively adopted half of the FTC's regulation: the Act mandated warnings on cigarette packages (5(a)), but barred the requirement of such warnings in cigarette advertising (*5(b)).* 9

Section 2 of the Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national

economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations. 10 In furtherance of the first purpose, 4 of the Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label stating:

"CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." In furtherance of the second purpose, 5, captioned "Preemption," provided in part:

"(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

"(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act took effect January 1, 1966, 10 of the Act provided that its provisions affecting the regulation of advertising would terminate on July 1, 1969.

As that termination date approached, federal authorities prepared to issue further regulations on cigarette advertising. The FTC announced the reinstitution of its 1964 proceedings [*505* U.S. 504,515] concerning a warning requirement for cigarette advertisements. 34 Fed. Reg. 7917 (1969). The Federal Communications Commission (FCC) announced that it would consider "a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations." Id., at 1959. State authorities also prepared to take actions regulating cigarette advertisements. 11

It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969 (1969 Act or Act), 12 which amended the 1965 Act in several ways. First, the

1969 Act strengthened the warning label, in part by requiring a statement that cigarette smoking "is dangerous," rather than that it "may be hazardous." Second, the 1969 Act banned cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction." Third, and related, the 1969 Act modified the preemption provision by replacing the original 5(b) with a provision that reads:

"(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Although the Act also directed the FTC not to take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising, the narrowing of the preemption provision to prohibit only restrictions "imposed under State law" cleared the way for the FTC to extend the warning label requirement to print advertisements for cigarettes. The FTC did so in 1972. See In re Lorillard, 80 F.T.C. *455* (1972). [505 U.S. 504,516]

III

Article VI of the Constitution provides that the laws of the United States shall be the supreme Law of the Land;.., any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. Art. VI, el. 2. Thus, since our decision in M'Culloch v. Maryland, 4 Wheat. 316,427 (1819), it has been settled that state law that conflicts with federal law is "without effect." Maryland v. Louisiana, 411 ~. 725 7.46 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by... Federal Act unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218. 230 (1947). Accordingly, "' [t]he

purpose of Congress is the ultimate touchstone"' of preemption analysis. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, *525* (1977). In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field " as to make reasonable the inference that Congress left no room for the States to supplement it."' Fidelity Fed. Say. & Loan Assn. v. De la Cuesta, 458 U.S. 141,] 53 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S., at 230).

The Court of Appeals was not persuaded that the preemption provision in the 1969 Act encompassed state common-law claims. 13 789 F.2d, at 185-186. It was also *[505* U.s. 504, 517] not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. Id., at 186. Nevertheless, reading the statute as a whole in the light of the statement of purpose in 2, and considering the potential regulatory effect of state common-law actions on the federal interest in uniformity, the Court of Appeals concluded that Congress had impliedly preempted petitioner's claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities. Id., at 187.

In our opinion, the preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in S of each Act. When Congress has considered the issue of preemption and has included in the enacted legislation a

provision explicitly addressing that issue, and when that provision provides " indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505 , "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation. Califomia Federal Savings & Loan Assn. v. Guerra, ~ (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond S of each Act. Therefore, we need only identify the domain expressly preempted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn. [505 U.S. 504. 518]

IV

In the 1965 preemption provision regarding advertising (*5(b)*), Congress spoke precisely and narrowly: "No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes." Section *5(a)* used the same phrase ("No statement relating to smoking and health") with regard to cigarette labeling. As *5(a)* made clear, that phrase referred to the sort of warning provided for in 4, which set forth verbatim the warning Congress determined to be appropriate. Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (*5(a)*) or in cigarette advertisements
(*5(b)*).

Beyond the precise words of these provisions, this reading is appropriate for several reasons. First, as discussed above, we must construe these provisions in light of the presumption against the preemption of state police power regulations. This presumption reinforces the

appropriateness of a narrow reading of 5. Second, the warning required in 4 does not, by its own effect, foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically preempt a regulatory field. See McDermott v. Wisconsin, ~ -132 (1913). Third, there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 14 Congress expressly preempted state or local imposition of a "statement relating to the use of smokeless tobacco products and health" but, at the same time, preserved state-law damages actions based on those products. See 15 U.S.C. 4406. All of these considerations indicate that S is best read as having superseded *[505* U.S. 504, 519] only positive enactments by legislatures or administrative agencies that mandate particular warning labels. 15

This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General's report, the term "regulation" most naturally refers to positive enactments by those bodies, not to common-law damages actions.

The regulatory context of the 1965 Act also supports such a reading. As noted above, a warning requirement promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act. These regulatory actions animated the passage of 5, which reflected Congress" efforts to prevent "a multiplicity of State and local regulations pertaining to labeling of cigarette packages," H.R.Rep. No. 449, 89th Cong., 1st Sess., 4 *(1965),* and to preemp[t] all Federal,

State, and local authorities from requiring any statement relating to smoking and health in the advertising of cigarettes. Id., at 5 (emphasis supplied). 16

For these reasons, we conclude that 5 of the 1965 Act only preempted state and federal rulemaking bodies from [505 U.S. 504,520] mandating particular cautionary statements, and did not preempt state-law damages actions. 17

V

Compared to its predecessor in the 1965 Act, the plain language of the preemption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]," but rather "requirement[s] or prohibition[s] ... imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Notwithstanding these substantial differences in language, both petitioner and respondents contend that the 1969 Act did not materially alter the preemptive scope of federal law. 18 Their primary support for this contention is a sentence in a Committee Report which states that the 1969 amendment "clarified" the 1965 version of 5(b). S. Rep. No. 9 1-566, p. 12(1969). We reject the parties' reading as incompatible with the language and origins of the amendments. As we noted in another context, "[i]nferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording, [505 U.S. 504, 521] we cannot accept the parties' claim that the 1969 Act did not alter the reach of 5(b). 19

Petitioner next contends that 5(b), however broadened by the 1969 Act, does not preempt common-law actions. He offers two theories forlimiting the reach of the amended 5(b). First, he argues that common-law damages actions do not impose "requirement[s] or prohibition[s]," and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." 20 We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly, and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Building Trades Council v. Garmon, 359 U.S. 236. 247 (1959).

Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities, see S. Rep. No. 9 1-566, p. 12, the language of the Act plainly reaches beyond such enactments. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." Shaw *[505* U.S. 504, 522] v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) . In this case, there is no "good reason to believe" that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is "good reason to believe" that Congress meant precisely what it said in amending that Act.

Moreover, common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose

"requirements or prohibitions." See W. Prosser, Law of Torts 4 (4th ed. 1971); Black's Law Dictionary 1489(6th ed. 1990) (defining "tort" as "always [involving] a violation of some duty owing to plaintiff"). It is in this way that the 1969 version of 5(b) differs from its predecessor: whereas the common law would not normally require a vendor to use any specific statement on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions. We therefore reject petitioner's argument that the phrase "requirement or prohibition" limits the 1969 Act's preemptive scope to positive enactments by legislatures and agencies.

Petitioner's second argument for excluding common-law rules from the reach of 5(b) hinges on the phrase "imposed under State law." This argument fails as well. At least since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations. Indeed just last Term, the Court stated that the phrase "'all other law, including State and municipal law'" "does not admit of [a] distinction... between positive enactments and common law rules of liability." Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117. 128 (1991). Although the presumption against preemption might give good reason to construe the phrase "state law" in a preemption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate. As explained above, the *[505* U.S. 504, 523] 1965 version of S was precise and narrow on its face; the obviously broader language of the 1969 version extended that section's preemptive reach. Moreover, while the version of the 1969 Act passed by the Senate preempted "any State statute or regulation with respect to... advertising or promotion," S. Rep. No. 9 1-566, p. 16 (1969), the Conference Committee replaced this language with "State law with respect to advertising or promotion." In such a situation, 5(b)'s preemption of "state law" cannot fairly be limited to positive enactments.

That the preemptive scope of 5(b) cannot be limited to positive enactments does not mean that that section preempts all common-law claims. For example, as respondents concede, 5(b) does not generally preempt "state law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes." 21 For purposes of 5(b), the common law is not of a piece.

Nor does the statute indicate that any familiar subdivision of common-law claims is or is not preempted. We therefore cannot follow petitioner's passing suggestion that 5(b) preempts liability for omissions, but not for acts, or that 5(b) preempts liability for unintentional torts, but not for intentional torts. Instead, we must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of 5(b), and we must look to each of petitioner's common-law claims to determine whether it is in fact preempted. 22 The central inquiry in each case is [505 U.S. 504, 524] straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health.., imposed under State law with respect to... advertising or promotion, giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims preempted by the statute.

We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, arguendo, that they are.

Failure to Warn

To establish liability for a failure to warn, petitioner must show that "a warning is necessary to make a product... reasonably safe, suitable and fit for its intended use," that respondents failed to provide such a warning, and that

that failure was a proximate cause of petitioner's injury. Tr. 12738. In this case, petitioner offered two closely related theories concerning the failure to warn: first, that respondents "were negligent in the manner [that] they tested, researched, sold, promoted, and advertised" their cigarettes; and second, that respondents failed to provide "adequate warnings of the health consequences of cigarette smoking." App. 85-86.

Petitioner's claims are preempted to the extent that they rely on a state-law "requirement or prohibition.., with respect to... advertising or promotion." Thus, insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted. The Act does not, however, preempt petitioner's claims that rely solely on respondents' *[505* U.S. 504, 525] testing or research practices or other actions unrelated to advertising or promotion.

Breach of Express Warranty

Petitioner's claim for breach of an express warranty arises under N.J. Stat. Ann. 12A: 2-3 13(l)(a) (West 1962), which provides:

"Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Petitioner's evidence of an express warranty consists largely of statements made in respondents' advertising. See 893 F.2d, at 574, 576; 683 F. Supp. 1487, 1497 (N.J. 1988). Applying the Court of Appeals' ruling that Congress preempted "damage[s] actions.., that challenge.., the propriety of a party's actions with respect to the advertising and promotion of cigarettes," 789 F.2d, at 187, the District Court ruled that this claim "inevitably brings

into question [respondents'] advertising and promotional activities, and is therefore preempted" after 1965. 649 F. Supp., at 675. As demonstrated above, however, the 1969 Act does not sweep so broadly: The appropriate inquiry is not whether a claim challenges the "propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed by the warrantor 23 If for example, a [505 U.S. 504, 526] manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be "imposed under state law," but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement.., based on smoking and health.., with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement.., imposed under State law" within the meaning of *5(b).* 24

That the terms of the warranty may have been set forth in advertisements, rather than in separate documents, is irrelevant to the preemption issue (though possibly not to the state-law issue of whether the alleged warranty is valid and enforceable), because, although the breach of warranty claim is made "with respect to... advertising," it does not rest on a duty imposed under state law. Accordingly, to the extent that petitioner has a viable claim for breach of express [505 U.S. 504, 527] warranties made by respondents, that claim is not preempted by the 1969 Act.

Fraudulent Misrepresentation

Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a prohibition, however, is merely the converse of a state-law requirement that warnings be included in advertising and promotional materials. Section *5(b)* of the 1969 Act preempts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent misrepresentation theory.

Regulators have long recognized the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements. For example, the FTC, in promulgating its initial trade regulation rule in 1964, criticized advertising that "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness., at the same time suggesting that smoking is an activity at least consistent with physical health and well-being." The Commission concluded:

"To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves." 29 Fed. Reg. 8356 (1964).

Longstanding regulations of the Food and Drug Administration express a similar understanding of the relationship between required warnings and advertising that "negates or disclaims" those warnings: "A hazardous substance shall not be deemed to have met [federal labeling] requirements if [505 U.S. 504, 528] there appears

in or on the label... statements, designs, or other graphic material that in any manner negates or disclaims [the required warning]." 21 CFR 191.102 *(1965)*. In this light, it seems quite clear that petitioner's first theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory, a theory that we have already concluded is largely preempted by 5(b).

Petitioner's second theory, as construed by the District Court, alleges intentional fraud and misrepresentation both by "false representation of a material fact [and by] conceal[ment of] a material fact." Tr. 12727. 25 The predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts. Our preemption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by *5(b)*.

Section *5(b)* preempts only the imposition of state-law obligations "with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, 5(b) would not preempt a state law-claim based on a failure to fulfill that obligation.

Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by *5(b)*. Such claims are predicated not on a duty "based on smoking and health," but rather on a more general obligation - [505 U.S. *504, 529]* the duty not to deceive. This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, Congress offered no sign that it wished to insulate

cigarette manufacturers from longstanding rules governing fraud. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices - an authority that the FTC had long exercised and continues to exercise. See *5(c)* of the 1965 Act; 7(b) of the 1969 Act; see also nn. 7, 9, supra. This indicates that Congress intended the phrase "relating to smoking and health" (which was essentially unchanged by the 1969 Act) to be constmed narrowly, so as not to proscribe the regulation of deceptive advertising. 26

Moreover, this reading of "based on smoking and health" is wholly consistent with the purposes of the 1969 Act. State-law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state-law obligations conceming the warning necessary to render a product "reasonably safe," state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health," fairly but narrowly construed, does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements is not preempted by *5(b)* of the 1969 Act. 27 [505 U.S. *504,530]*

Conspiracy to Misrepresent or Conceal Material Facts

Petitioner's final claim alleges a conspiracy among respondents to misrepresent or conceal material facts conceming the health hazards of smoking. 28 The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty is not preempted by 5(b), for it is not a prohibition "based on smoking and health" as that phrase is properly constmed. Accordingly, we conclude that the 1969 Act does not preempt petitioner's conspiracy claim.

VI

To summarize our holding: the 1965 Act did not preempt state-law damages actions; the 1969 Act preempts petitioner's claims based on a failure to warn and the neutralization *[505* U.S. 504, 531] of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not preempt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

The judgment of the Court of Appeals is accordingly reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote I] Public Health Cigarette Smoking Act of 1969, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. 1331-1340. In 1984, Congress amended the statute to require four more explicit warnings, used on a rotating basis. See Comprehensive Smoking Education Act, Pub. L. 98474, 98 Stat. 2201. Because petitioner's claims arose before 1984, neither party relies on this later Act.

[Footnote 2] The Court of Appeals' analysis was initially set forth in Cipollone v. Liggett Group, Inc., 789 F.2d 181 (CA3 1986). Other federal courts have adopted a similar analysis. See Pennington v. Vistron Corp., 876 F.2d 414 (CAS 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (CA6 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (CAl 11987); Palmer v. Liggett Group, Inc., 825 F.2d 620 (CAl 1987).

[Footnote 3] Dewey v. R. J. Reynolds Tobacco Co., 121 N. J. 69, 577 A.2d 1239 (1990) (holding that the Cigarette Act does not pre-empt plaintiffs failure-to-warn and misrepresentation claims); see also Forster v. R. J. Reynolds Tobacco Co., 437 N. W. 2d 655 (Minn. 1989) (holding that plaintiffs' claim in strict liability for unsafe design was not pre-empted; claims for misrepresentation and breach of express warranty would also not be pre-empted).

[Footnote 4] The court explained:

"However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act. 593 F.Supp., at 1148.

[Footnote 5] It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby -

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. 15 U.S.C. 1331 (1982 ed.).

[Footnote 6] We are not presented with any question concerning these claims.

[Footnote 7] See, e.g, Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960); Liggett & Myers Tobacco Co., *55* F.T.C. 354 (1958); Philip Morris & Co., Ltd., 51 F.T.C. 857 *(1955);* R.J. Reynolds Tobacco Co., 48 F.T.C. 682 *(1952);* London Tobacco Co., 36 F.T.C. 282 (1943).

[Footnote 8] Pub.L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. 1331-1340.

[Footnote 9] However, *5(c)* of the Act expressly preserved the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. 79 Stat. 283.

r Footnote 10 1 See n. *5,* supra.

~ Footnote 11] For example, the California State Senate passed a total ban on both print and electronic cigarette

advertisements. "California Senate Votes Ban On Cigarette Advertising," Washington Post, June 26, 1969, p. A9. [Footnote 12 1 Pub.L. 91-222, 84 Stat. 87, *as* amended, 15 U.S.C. 1331-1340.

r Footnote 13 1 In its express preemption analysis. the court did not distinguish between the preemption provisions of the

1965 and 1969 Acts; it relied solely on the latter, apparently believing that the 1969 provision was at least as *[505* U.S.

504,517] broad as the 1965 provision. The COUP'S ultimate ruling that petitioner's claims were impliedly preempted

effective January 1, 1966, reflects the fact that the 1969 Act did not alter the statement of purpose in 2, which was

critical to the court's implied preemption analysis.

~ Footnote 14] Pub.L. *99-252,* 100 Stat. 30, as codified, 15 U.S.C. 4401-4408.

[Footnote 15] Cf. Banzhafv. FCC, 132 U.S. App. D.C. 14, *405* F.2d 1082 (1968), cert. denied, 396 U.S. 842 (1969) (holding that 1965 Act did not preempt FCC's fairness policy as applied to cigarette advertising).

[Footnote 16 1 JUSTICE SCALIA takes issue with our narrow reading of the phrase "No statement." His criticism, however, relies solely on an interpretation of those two words, artificially severed from both textual and legislative context. As demonstrated above, the phrase "No statement" in 5(b) refers to the similar phrase in 5(a), which refers in turn to 4, which itself sets forth a particular statement. This context, combined with the regulatory setting in which Congress acted, establishes that a narrow reading of the phrase "No statement" is appropriate.

[Footnote 17 1 This interpretation of the 1965 Act appears to be consistent with respondents' contemporaneous understanding of the Act. Although respondents have participated in a great deal of litigation relating to cigarette use beginning in the 1950's, it appears that this case is the first in which they have raised 5 as a preemption defense.

[Footnote 18] See Brief for Petitioner 23-24; Brief for Respondents 21-23.

r Footnote 19] As noted above, the 1965 Act's statement of purpose (2) suggested that Congress was concerned primarily with "regulations" - positive enactments, rather than common-law damages actions.

Although the 1969 Act did not amend 2, we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to 5(b).

II Footnote 20 1 Brief for Petitioner 20.

[Footnote 21] Brief for Respondents 14.

I Footnote 22 1 Petitioner makes much of the fact that congress did not expressly include common law within *5's* preemptive reach, as it has in other statutes. See, e.g., 29 U.S.C. 1 144(c)(1); 12 U.S.C. 1715z-17(d). Respondents make much of the fact that congress did not include a saving clause preserving common-law claims, again, as it has in other statutes. See, e.g., 17 U.S.C. 301. Under our analysis of *5*, these omissions make perfect sense: Congress was neither preempting nor saving common law *[505* U.S. *504, 524]* as a whole - it was simply preempthg particular common-law claims, while saving others.

r Footnote 23 1 Thus it is that express warranty claims are said to sound in contract, rather than in tort. Compare Black's

Law Dictionary 1489 (6th ed. 1990) (defining "tort': "There must always be a violation of some du~... arid *[505* U.S. *504,*

526] generally such duty must arise by operation of law and not by mere agreement of the parties") with id., at 322

(defining "contract": "An agreement between ~o... persons which creates an obligation").

[Footnote 24] JUSTICE SCALIA contends that, because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requ~ement... imposed under State law," and that, therefore, the Act preempts petitioner's express warranty claim. JUSTICE SCALIA might be correct if the Act preempted "liability" imposed under state law (as he suggests, post, at *551);* but, instead, the Act expressly preempts only a "requirement or prohibition" imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character," Norfolk & Western R. Co. v. Train Dispatchers, 4.% .5. 117 130 (1991), does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the State, but rather is "imposed" by the contracting party upon itself

[Footnote 25] The District Court stated that this claim "consists of the following elements: 1) a material misrepresentation of... fact [by false

statement or concealment]; 2) knowledge of the falsity... ; 3) intent that the misrepresentation be relied upon; 4) justifiable reliance... ; *5)* resultant damage." 683 F.Supp. 1487, 1499 (N.J. 1988).

[Footnote 26] The Senate Report emphasized that the "preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State... with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations." S. Rep. No. 91-566, p. 12(1969) (emphasis supplied).

[Footnote 27] Both JUSTICE BLACKMUN and JUSTICE SCALIA challenge the level of generality employed in our analysis. JUSTICE BLACKMUN contends that, as a matter of consistency, we should constme failure-to-warn claims not *[505* U.S. 504.530] as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." Post, at 543. JUSTICE SCALIA contends that, again as a matter of consistency, we should constme fraudulent misrepresentation claims not as based on a general duty not to deceive, but rather as "based on smoking and health." Admittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure-to-warn claims at the highest level of generality (as JUSTICE BLACKMUN would have us do) would render the 1969 amendments almost meaningless, and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as JUSTICE SCALIA would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. See n. 25, supra.

[Footnote 28] The District Court described the evidence of conspiracy as follows:

"Evidence presented by [petitioner], particularly that contained in the documents of [respondents] themselves, indicates.., that the industry of which these [respondents] were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical ..... 683 F.Supp., at 1490.

JUSTICE BLACKMUN, with whom JUSTICE KENNEDY and JUSTICE SOUTER join, concurring in part, concurring

in the judgment in part, and dissenting in part.

I

The Court today would craft a compromise position concerning the extent to which federal law preempts persons injured by cigarette manufacturers' unlawful conduct from bringing state common law damages claims against those manufacturers. I, however, find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of preemption beyond that which clearly is mandated by Congress' language. In my view, neither version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common law damages claims. I therefore join Parts I, II, III, and IV of the Court's opinion, but dissent from Parts V and VI.

A

I agree with the Court's exposition, in Part III of its opinion, of the underlying principles of preemption law, and in particular with its recognition that the preemptive scope of the Federal Cigarette Labeling and Advertising Act (1965 Act or Act) and the Public Health Cigarette Smoking Act of *[505* U.s. *504,* 532] 1969 (1969 Act) is "governed entirely by the express language" of the statutes' preemption provisions. Ante, at 517. Where, as here, Congress has included in legislation a specific provision addressing - and indeed, entitled - preemption, the Court's task is one of statutory interpretation - only to "identify the domain expressly preempted" by the provision. Ibid. An interpreting court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990), (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189. 194 *(1985)).* See Califomia

Coastal Comm'n. v. Granite Rock Co., 480 U.S. 572, 591-593 (1987); Califomia Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272. 282 (1987) (opinion of Marshall, 1.). We resort to principles of implied preemption - that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, see English v. General Electric Co., 496 U.S. 72, 79 (1990) - only when Congress has been silent with respect to pre-emption.

I further agree with the Court that we cannot find the state common law damages claims at issue in this case preempted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. See ante, at 516. The Court describes this reluctance to infer preemption in ambiguous cases as a "presumption against the preemption of state police power regulations." Ante, at 518. Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied preemption, see, e.g., Florida Lime Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 -152 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 - 237 (1947), this Court often speaks in general terms without reference to the nature of the preemption at issue in the given statutory scheme. See, e.g., Maryland v. Louisiana, *[505* U.s. 504, 533] 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); Avocado Growers, 373 U. S., at 146 - 147 ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute... in the absence of an unambiguous congressional mandate to that effect"); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.).

The principles of federalism and respect for state

sovereignty that underlie the Court's reluctance to find preemption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to preempt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language. 11 therefore agree with the Court's unwillingness to conclude that the state common law damages claims at issue in this case are preempted unless such result is "'the clear and manifest purpose of Congress."' Ante, at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S.. at 230).

B

I also agree with the Court's application of the foregoing principles in Part IV of its opinion, where it concludes that [505 U.S. 504.534] none of petitioner's common law damages claims are preempted by the 1965 Act. In my view, the words of *5(b)* of that Act ("No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act") can bear only one meaning: that States are prohibited merely from "mandating particular cautionary statements.., in cigarette advertisements." Ante, at 518. As the Court recognizes, this interpretation comports with Congress' stated purpose of avoiding "'diverse, nonuniform, and confusing cigarette labeling and advertising regulations"' relating to smoking and health. Ante, at 519 (quoting 15 U.S.C. 1331(2)). The narrow scope of federal preemption is thus apparent from the statutory text, and it is correspondingly impossible to divine any "clear and manifest purpose" on the part of Congress to preempt common law damages actions.

II

My agreement with the Court ceases at this point. Given the Court's proper analytical focus on the scope of the

express preemption provisions at issue here and its acknowledgment that the 1965 Act does not preempt state common law damages claims, I find the Court's plurality's conclusion that the 1969 Act preempts at least some common law damages claims little short of baffling. In my view, the modified language of *5(b)*, *15* U.S.C. 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act"), no more "clearly" or "manifestly" exhibits an intent to preempt state common law damages actions than did the language of its predecessor in the 1965 Act. Nonetheless, the plurality reaches a different conclusion, and its reasoning warrants scrutiny. [505 U.S. 504, *535]*

A

The plurality premises its preemption ruling on what it terms the "substantial changes" wrought by Congress in *5(b)*, ante, at *520*, notably, the rewording of the provision to preempt any "requirement or prohibition" (as opposed merely to any "statement") "imposed under State law." As an initial matter, I do not disagree with the plurality that the phrase "State law," in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations. See ante, at *522-523*. I do disagree, however, with the plurality's conclusion that "State law" as used in *5(b)* represents such an all-inclusive reference. Congress' intention in selecting that phrase cannot be understood without considering the narrow range of actions - any "requirement or prohibition" - that Congress specifically described in *5(b)* as "imposed under" state law. See United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not.., construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase" (footnote omitted)); Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961) ("The maxim noscitur a sociis, that a word is known by the company it keeps,

while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to the Acts of Congress"); see also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117. 138 -139 (1991) (STEVENS, J., dissenting) (declining to read the phrase "all other law, including State and municipal law," broadly).

Although the plurality flatly states that the phrase "no requirement or prohibition""sweeps broadly" and "easily encompass[es] obligations that take the form of common-law rules," ante, at 521, those words are in reality far from unambiguous, and cannot be said clearly to evidence a congressional mandate to preempt state common law damages actions. The dictionary definitions of these terms suggest, if [505 U.S. 504,536] anything, specific actions mandated or disallowed by a formal goveming authority. See, e.g., Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "[a]ct or law prohibiting something"; an "interdiction").

More important, the question whether common law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments - an assumption crucial to the plurality's conclusion that the phrase "requirement or prohibition" encompasses common-law actions - is significantly more complicated than the plurality's brief quotation from San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 *(1959)*, see ante, at 521, would suggest.

The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages, by its very nature, attaches additional consequences to the manufacturer's continued unlawful conduct, no particular

course of action (e.g., the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business, and not alter its behavior in any way. See Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 -186 (1988) (corporation "may choose to disregard [state] safety regulations and simply pay an additional" damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments [505 U.s. 504, 537] such as statutes and administrative regulations. See Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 90, 577 A.2d 1239, 1249 (1990); Garner, Cigarette Dependency

and Civil Liability: A Modest Proposal, 53 S. Cal. L. Rev. 1423, 1454 (1980). Moreover, tort law has an entirely separate function - compensating victims - that sets it apart from direct forms of regulation. See Ferebee v. Chevron Chemical Co., 237 U.S. App. D.C. 164, 175, 736 F.2d *1529*, 1540, cert. denied, 469 U.S. 1062 (1984).

Despite its earlier acknowledgment, consistent with the foregoing conception of damages actions, that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions," ante at 518 2 the plurality apparently finds Garmon's statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," 359 U.S., at 247, sufficient authority to warrant extinguishing the common-law actions at issue in this case. See ante, at 521.1 am not persuaded. Not only has the Court previously distinguished Gannon 3 but it has declined on several recent occasions to find the regulatory

effects of state tort law direct or substantial enough to warrant pre-emption.

In Goodyear Atomic Corp. v. Miller, for example, the Court distinguished, for purposes of pre-emption analysis, [505 U.s. 504,538] "direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. 486 U.S., at 185 . Relying in part on its earlier decision in Silkwood v. Kerr McGee Corp., 464 U.S. 238, 256 (1984), 4 the Court stated that Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. 486 U.S., at 186 . Even more recently, the Court declined in English v. General Electric Co., 496 U.S.. at 86 , to find state common law damages claims for emotional distress preempted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct, and could lead employers to alter the underlying conditions about which employees were complaining, ibid., such an effect would be "neither direct nor substantial enough" to warrant preemption. Id., at 85.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law. [505 U.S. 504,539] The plain language of the 1969 Act's modified preemption provision simply cannot bear the broad interpretation the plurality would impart to it.

B

Not only does the text of the revised *5(b)* fail clearly or manifestly to require preemption of state common law damages actions, but there is no suggestion in the

legislative history that Congress intended to expand the scope of the preemption provision when it amended the statute in 1969. The plurality acknowledges the evidence that Congress itself perceived the changes in *5(b)* to be a mere "'clarifi[cation]"' of the existing narrow preemption provision, ante, at 520 (quoting S. Rep. No. 9 1-566, p. 12 (1969) (hereinafter S. Rep.)), but it dismisses these statements of legislative intent as the "'views of a subsequent Congress."' Ante, at 520 (quoting United States v. Price, 361 U.S. 304,313(1960)). The plurality is wrong not only as a factual matter - for the statements of the Congress that amended *5(b)* are contemporaneous, not "subsequent," to enactment of the revised preemption provision - but as a legal matter, as well. This Court accords "great weight" to an amending Congress' interpretation of the underlying statute. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 -381 and n. 8 (1969).

Viewing the revisions to *5(b)* as generally nonsubstantive in nature makes sense. By replacing the word "statement" with the slightly broader term, "requirement," and adding the word "prohibition" to ensure that a State could not do through negative mandate (e.g., banning all cigarette advertising) that which it already was forbidden to do through positive mandate (e.g., mandating particular cautionary statements), Congress sought to "clarify]" the existing *[505* U.S. 504, 540] precautions against confusing and nonuniform state laws and regulations. S. Rep. at 12. *5*

Just as it acknowledges the evidence that Congress' changes in the preemption provision were nonsubstantive, the plurality admits that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities." Ante, at 521. Indeed, the relevant Senate report explains that the revised preemption provision is "intended to include not only action by State statute, but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State," a

list remarkable for the absence of any reference to common law damages actions. S. Rep. at 12. Cf. e.g., 29 U.S.C. 1144(a) and (c)(1) (ERISA statute defines "any and all State laws" as used in preemption provision to mean "all laws, decisions, rules, regulations, or other State action having the effect of law") (emphasis added). The plurality dismisses this statement with the simple observation that "the language of the Act plainly reaches beyond such [positive] enactments." Ante, at 521. Yet, as discussed above, the words of *5(b)* ("requirement or prohibition") do not so "plainly" extend to common law damages actions, and the plurality errs in placing so much weight on this fragile textual hook.

The plurality further acknowledges that, at the same time that Congress amended the preemption provision of *5(b)*, it made no effort to alter the statement of purpose contained in 2 of the 1965 Act. Ante, at 521, n.19. Although the [505 U.S. 504.541] plurality relegates this fact to a footnote, the continued vitality of 2 is significant, particularly in light of the Court's reliance on the same statement of purpose for its earlier conclusion that the 1965 Act does not preempt state common law damages actions. See ante, at 519 (concluding that Congress' expressed intent to avoid diverse, nonuniform, and confusing regulations "most naturally refers to positive enactments by [state legislatures and federal agencies], not to common-law damages actions").

Finally, there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common law damages claims are preempted. The Court in the past has hesitated to find preemption where federal law provides no comparable remedy. See Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in

compensating injury victims"). Indeed, in Silkwood, the Court took note of "Congress' failure to provide any federal remedy" for injured persons, and stated that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S., at 251 . See also id., at 263 (BLACKMUN, J., dissenting) ("[I]t is inconceivable that Congress intended to leave victims with no remedy at all").

Unlike other federal statutes where Congress has eased the bite of preemption by establishing "comprehensive" civil enforcement schemes, see, e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133. 144 -145 (1990) (discussing 502(a) of ERISA), the Cigarette Labeling and Advertising Act is barren of alternative remedies. The Act merely empowers the Federal Trade Commission to regulate unfair or deceptive advertising practices (*15* U.S.C. 1336), establishes minimal *[505* U.S. 504, 542] criminal penalties (misdemeanor and fine not to exceed $10,000) for violations of the Act's provisions (1338), and authorizes federal courts, upon the Government's application, to enjoin violations of the Act (1339). Unlike the plurality, I am unwilling to believe that Congress, without any mention of state common law damages actions or of its intention dramatically to expand the scope of federal preemption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct.

Thus, not only does the plain language of the 1969 Act fail clearly to require preemption of petitioner's state common law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the preemption provision in the drastic manner that the plurality attributes to it. Our obligation to infer preemption only where Congress' intent is clear and manifest mandates the conclusion that state common law damages actions are not preempted by the 1969 Act. 6

III

Stepping back from the specifics of the plurality's preemption analysis to view the result the plurality ultimately reaches, I am further disturbed. Notwithstanding the Court's ready acknowledgment that "' "[t]he purpose of Congress is the ultimate touchstone"' of preemption analysis," ante, at 516 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)), the plurality proceeds to create a crazy quilt of *[505* U.S. 504, 543] pre-emption from among the common law claims implicated in this case, and, in so doing, reaches a result that Congress surely could not have intended.

The most obvious problem with the plurality's analysis is its frequent shift in the level of generality at which it examines the individual claims. For example, the plurality's states that fraudulent misrepresentation claims (at least those involving false statements of material fact in advertisements) are "predicated not on a duty 'based on smoking and health,' but rather on a more general obligation - the duty not to deceive," and therefore are not preempted by 5(b) of the 1969 Act. Ante, at 528-529. Yet failure-to-warn claims - which could just as easily be described as based on a "more general obligation" to inform consumers of known risks - implicitly are found to be "based on smoking and health," and are declared preempted. See ante, at 524. The plurality goes on to hold that express warranty claims are not preempted because the duty at issue is undertaken by the manufacturer, and is not "imposed under State law." Ante, at 525. Yet, as the plurality itself must acknowledge, "the general duty not to breach warranties arises under state law," ibid. (emphasis added); absent the State's decision to penalize such behavior through the creation of a common law damages action, no warranty claim would exist.

In short, I can perceive no principled basis for many of the plurality's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to

create such a hodgepodge of allowed and disallowed claims when it amended the preemption provision in 1970. Although the plurality acknowledges that 5(b) fails to "indicate that any familiar subdivision of common-law claims is or is not preempted," ante, at 523, it ignores the simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the plurality does today. I can only speculate as to the difficulty *[505* U.S. *504,* 544] lower courts will encounter in attempting to implement today's decision.

IV

By finding federal preemption of certain state common law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result. Because I believe that neither version of the Federal Cigarette Labeling and Advertising Act evidences such a clear congressional intent to preempt state common law damages actions, I respectfully dissent from Parts V and VI of the JUSTICE STEVENS' opinion.

[Footnote 1] The Court construes congressional inroads on state power narrowly in other contexts, as well. For example, the Court repeatedly has held that, in order to waive a State's sovereign immunity from suit in federal court, Congress must make its intention "unmistakably clear in the language of the statute." Atascadero State Hospital v. Scanlon, 473 U.S. 234. 242 (1985); Dellmuthv. Muth, 491 U.S. 223. 228 (1989).

[Footnote 2] Congress, in fact, has expressly allowed common law damages actions to survive while preempting other, more direct forms of state regulation. See, e.g., Comprehensive Smokeless Tobacco Health Education Act of 1986, 7, 100 Stat. 34, 15 U.S.C. 4406; Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 et seq., as construed in Cade v. National Solid Wastes Management Assn., ante, p. 88.

[Footnote 3] The Court has explained that Garmon, in which a state common law damages award was found to be preempted by the National Labor Relations Act, involved a special "presumption of federal preemption" relating to the primary jurisdiction of the National Labor Relations Board. See Brown v. Hotel Employees, 468 U.S. 491, 502 (1984); Englishv. General Electric Co., 496 U.S. 72, 86 -87, n. 8 (1990).

[Footnote 4] The Court in Silkwood declined to find state punitive damages awards preempted by federal nuclear safety laws, explaining: "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." U.S at 256 Although the Court has noted that the decision in Silkwood was based in "substantial part" on affirmative evidence in the legislative history suggesting that Congress did not intend to include common law damages remedies within the preempted field, see English v. General Electric Co., 4.% 2.S.A 86., 72 (1990), Silkwood's discussion of the regulatory effects of the common law is instructive, and has been relied on in subsequent cases. See, e.g., Goodyear, 486 U.S., at

186.

Footnote 5] In the one reported case construing the scope of preemption under the 1965 Act, Banzhaf v. FCC - a case of which Congress was aware, see S. Rep. at 7 - the Court of Appeals for the District of Columbia Circuit used the term "affirmative requirements" to describe 5(b)'s ban on "statement[s]." 132 U.S. App. D.C. 22,405 F.2d 1082, 1090 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969). It is but a small step from "affirmative requirement" to the converse, "negative requirement" ("prohibition"), and from there to the single explanatory phrase "requirement or prohibition."

[Footnote 6] Every Court of Appeals to consider the question, including the Third Circuit in an earlier opinion in this case, similarly has concluded that state common law damages claims are not expressly preempted under the 1969 Act. See, e.g., Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185-186 (CA3 1986), cert. denied, 479 U.S. 1043 (1987); Pennington v. Vistron Corp., 876 F.2d 414,418 (CAS 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (CA6 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (CAl 1987). See also Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 85, 577 A.2d 1239, 1247 (1990); Forster v. R. J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Mm. 1989).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,

concurring in the judgment in part and dissenting in part.

Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express preemption provisions must be construed narrowly, "in light of the presumption against the preemption of state police power regulations." Ante, at 518. The life span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V by adjudging at least some of the common law tort claims at issue here preempted. In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did that job in the present case, we would find, under the 1965 Act, preemption of the petitioner's failure-to-warn claims; and, under the 1969 Act, we would find preemption of the petitioner's claims complete. [505 U.S. 504, *545]*

I

The Court's threshold description of the law of preemption is accurate enough: though we generally "assum[e] that the historic police powers of the States [are] not to be superseded by... Federal Act unless that [is] the clear and manifest purpose of Congress," ante, at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218. 230 (1947)), we have traditionally not thought that to require express statutory text. Where state law is in actual conflict with federal law, see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983), or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52. 67 (1941), or even where the nature of Congress' regulation, or its scope, convinces us that "Congress left no room for the States to supplement

it," Rice, supra, at 230, we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved. See, e.g., English v. General Electric Co., 496 U.S. 72, 78 -79 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

The Court goes beyond these traditional principles, however, to announce two new ones. First, it says that express preemption provisions must be given the narrowest possible construction. This is, in its view, the consequence of our oft-repeated assumption that, absent convincing evidence of statutory intent to preempt, "'the historic police powers of the States [are] not to be superseded,"' see ante, at 516. But it seems to me that assumption dissolves once there is conclusive evidence of intent to preempt in the express words of the statute itself, and the only remaining question is what the scope of that preemption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction. *[505* U.S. 504, *546]*

That is precisely what our express preemption cases have done. Less than a month ago, in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), we held that the Airline Deregulation Act's provision preempting state laws "relating to [airline] rates, routes, or services," 49 U.S.C. App. 1 305(a)(1), was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any "plain-statement" rule, or rule of narrow construction, but applied the usual "' "assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose."'" Morales, supra, at 383 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990)) (emphasis added). And last Term, in Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991), we interpreted an express pre-emption provision broadly despite the fact that a well-respected canon of statutory construction

supported a narrower reading. See id., at 129; id., at 136 (STEVENS, J., dissenting). We said not a word about a "presumption against... pre-emption," ante, at 518, that was to be applied to construction of the text.

In light of our willingness to find preemption in the absence of any explicit statement of preemptive intent, the notion that such explicit statements, where they exist, are subject to a "plain-statement" rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. See, e.g., United States v. Mitchell, 445 U.S. 535. 538 (1980) (waivers of federal sovereign immunity must be "unequivocally expressed"); Will v. Michigan Dept. of State Police, 491 U.S. 58. 65 (1989) (clear statement required to compel States to entertain damages suits against themselves in state *[505* U.S. 504. *547]* courts); Atascadero State Hospital v. Scanlon, 473 U.S. 234. 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). But none of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by sheer implication, with no express statement of intent at all. That is the novel regime the Court constructs today.

The results seem odder still when one takes into account the second new rule that the Court announces: "When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue,... we need only identify the domain expressly preempted by [that provision]." Ante, at 517. Once there is an express preemption provision, in other words, all doctrines of implied preemption are eliminated. This proposition may be correct insofar as implied "field" preemption is concerned: the existence of an express

preemption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines. However, with regard to implied "conflict" preemption - i.e., where state regulation actually conflicts with federal law, or where state regulation "stands as an obstacle to the accomplishment and execution" of Congress's purposes, Hines, supra, at 67- the Court's second new rule works mischief If taken seriously, it would mean, for example, that, if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law - forbidding, for example, the use of certain safety equipment that federal law requires. To my knowledge, we have never expressed such a rule before, and our prior cases are inconsistent [505 U.S. 504, 548] with it. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519. 540 -543 (1977). When this second novelty is combined with the first, the result is extraordinary: the statute that says anything about preemption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of congresses will dare to say anything about preemption.

The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: their language should be given its ordinary meaning. FMC Corp. v. Holliday, supra, at 57; Shaw v. Delta Air Lines, 463 U.S.. at 97 . When this suggests that the preemption provision was intended to sweep broadly, our construction must sweep broadly as well. See, e.g., id., at 96-97. And when it bespeaks a narrow scope of preemption, so must our judgment. See, e.g., Fort Halifax Packing Co. v. Coyne, 45~IL?1 -8(1987). Applying its niggardly rule of construction, the Court finds (not

surprisingly) that none of petitioner's claims - common law failure to warn, breach of express warranty, and intentional fraud and misrepresentation - is preempted under 5(b) of the 1965 Act. And save for the failure-to-warn claims, the Court reaches the same result under 5(b) of the 1969 Act. I think most of that is error. Applying ordinary principles of statutory construction, I believe petitioner's failure-to-warn claims are preempted by the 1965 Act, and all his common-law claims by the 1969 Act.

II

With much of what the plurality says in Part V of its opinion I agree - that "the language of the 1969. Act plainly reaches beyond [positive] enactments," ante, at 521; that the general tort law duties petitioner invokes against the cigarette companies can, as a general matter, impose "requirement[s] or prohibition[s]" within the meaning of 5(b) of the [505 U.S. *504,549]* 1969 Act, ibid.; and that the phrase "State law," as used in that provision, embraces state common law, ante, at

523. I take issue with the plurality, however, on its application of these general principles to the present case. Its finding that they produce only partial preemption of petitioner's common law claims rests upon three misperceptions that I shall discuss in turn, under headings indicating the erroneously permitted claims to which they apply.

A

Pre-1969 Failure-to-Warn Claims

According to the Court, 1 5(b) of the 1965 Act "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." Ante, at 518-519 (emphasis added). In essence, the Court reads 5(b)'s critical language "No statement relating to smoking and health shall be

required" to mean "No particular statement relating to smoking and health.., shall be required." The Court reasons that because common law duties do not require cigarette manufacturers to include any particular statement in their advertising, but only some statement warning of health risks, those duties survive the 1965 Act. I see no basis for this element of "particularity." To require a warning about cigarette health risks is to require a "statement relating to smoking and health." If the "presumption against.., preemption," ante, at 518, requires us to import limiting language into the 1965 Act, I do not see why it does not require us to import similarly limiting language into the 1969 Act - so that a "requirement... based on smoking and health.., with respect to advertising" means only a specific requirement, and not just general, non cigarette-specific duties imposed by tort law. The divergent treatment of the 1965 Act cannot be *[505* U.S. 504, *550]* justified by the Act's statement of purposes, which, as the Court notes, expresses concern with "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. 1331(2) (emphasis added). That statement of purposes was left untouched by Congress in 1969, and thus should be as restrictive of the scope of the later 5(b) as the Court believes it is of the scope of the earlier one. 2

To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, preempted. In addition, for reasons I shall later explain, see Part III, infra, I would find preemption even of those claims based on respondents' failure to make health-related statements to consumers outside their advertising. However, since 5(b) of the 1965 Act enjoins only those laws that require "statement[s]" in cigarette advertising, those of petitioner's claims that, if accepted, would penalize statements voluntarily made by the cigarette companies must be deemed to survive. As these would appear to

include petitioner's breach-of-express-warranty and intentional fraud and misrepresentation claims, I concur in the Court's judgment in this respect. *[505*

U.S. 504, 551]

B

Post-1969 Breach-of-Express-Warranty Claims

In the context of this case, petitioner's breach-of-express-warranty claim necessarily embodies an assertion that respondents' advertising and promotional materials made statements to the effect that cigarette smoking is not unhealthy. Making such statements civilly actionable certainly constitutes an advertising "requirement or prohibition.., based on smoking and health." The plurality appears to accept this, but finds that liability for breach of express warranty is not "imposed under State law" within the meaning of 5(b) of the 1969 Act. "[R]ather," it says, the duty "is best understood as undertaken by the manufacturer itself" Ante, at 526. I cannot agree.

When liability attaches to a particular promise or representation, it attaches by law. For the making of a voluntary promise or representation, no less than for the commission of an intentional tort, it is the background law against which the act occurs, and not the act itself, that supplies the element of legal obligation. See Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 429 (1934); N. J. Stat. Ann. 12A:2-313(1), 12A:2-714, and 12A:2-715 (West 1962) (providing for enforcement of express warranties). Of course, New Jersey's law of express warranty attaches legal consequences to the cigarette manufacturer's voluntary conduct in making the warranty, and in that narrow sense, I suppose, the warranty obligation can be said to be "undertaken by the manufacturer." But on that logic, it could also be said that the duty to warn about the dangers of cigarettes is undertaken voluntarily by manufacturers when they

choose to sell in New Jersey; or, more generally, that any legal duty imposed on volitional behavior is not one imposed by law.

The plurality cites no authority for its curious view, which is reason enough to doubt it. In addition, however, we rejected this very argument last Term in Norfolk & Western *[505 U.S. 504, 552]* R. Co. v. Train Dispatchers, where we construed a federal exemption "from the antitrust laws and from all other law," 49 U.S.C. 11341(a), to include an exemption from contract obligations. We observed, in a passage flatly inconsistent with the plurality's analysis today, that "[a] contract has no legal force apart from the law that acknowledges its binding character." 499 U.S.. at 130 . Cf. id., at 139 (STEVENS, J., dissenting). I would find petitioner's claim for breach of express warranty preempted by 5(b) of the 1969 Act.

C

Post-1969 Fraud and Misrepresentation Claims

According to the plurality, at least one of petitioner's intentional fraud and misrepresentation claims survives 5(b) of the 1969 Act because the common law duty underlying that claim is not "based on smoking and health" within the meaning of the Act. See ante, at 528-529. If I understand the plurality's reasoning, it proceeds from the implicit assumption that only duties deriving from laws that are specifically directed to "smoking and health," or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within 5(b) of the Act, as amended. Given that New Jersey's tort law "duty not to deceive," ante, at 529, is a general one, applicable to all commercial actors and all kinds of commerce, it follows from this assumption that 5(b) does not preempt claims based on breaches of that duty.

This analysis is suspect, to begin with, because the

plurality is unwilling to apply it consistently. As JUSTICE BLACKMUN cogently explains, see ante, at 543 (opinion concurring in part and dissenting in part), if New Jersey's common law duty to avoid false statements of material fact - as applied to the cigarette companies' behavior - is not "based on smoking and health," the same must be said of New Jersey's common law duty to warn about a product's dangers. Each duty transcends the relationship between the cigarette companies *[505 U.S. 504, 553]* and cigarette smokers; neither duty was specifically crafted with an eye toward "smoking and health." None of the arguments the plurality advances to support its distinction between the two is persuasive. That Congress specifically preserved, in both the 1965 and 1969 Acts, the Federal Trade Commission's authority to police deceptive advertising practices, see 5(c) of the 1965 Act; 7(b) of the 1969 Act, ante, at 529, does not suggest that Congress intended comparable state authority to survive 5(b). In fact, at least in the 1965 Act (which generally excluded federal as well as state regulation), the exemption suggested that 5(b) was broad enough to reach laws governing fraud and misrepresentation. And it is not time that the States' laws governing fraud and misrepresentation in advertising impose identical legal standards, whereas their laws "concerning the warning necessary to render a product 'reasonably safe"' are quite diverse, Ibid. The question whether an ad featuring a glamorous, youthful smoker with pearly-white teeth is "misrepresentative" would almost certainly be answered differently from State to State. See ante, at 527 (discussing FTC's initial cigarette advertising rules).

Once one is forced to select a consistent methodology for evaluating whether a given legal duty is "based on smoking and health," it becomes obvious that the methodology must focus not upon the ultimate source of the duty (e.g., the common law), but upon its proximate application. Use of the "ultimate source" approach (i.e., a legal duty is not "based on smoking and health" unless the law from which it derives is directed only to smoking and

health) would gut the statute, inviting the very "diverse, nonuniform, and confusing cigarette.., advertising regulations" Congress sought to avoid. 15 U.S.C. 1331(2). And the problem is not simply the common law: requirements could be imposed by state executive agencies as well, so long as they were operating under a general statute authorizing their supervision of "commercial advertising" or "unfair trade practices." New *[505 U.S. 504, 554]* Jersey and many other States have such statutes already on the books. E.g., N.J. Stat. Ann. 56:8-1 et seq. (West 1989); N.Y.Gen.Bus.Law 349 et seq. (McKinney 1988 and Supp. 1992); Texas Bus. & Com. Code Ann. 17.01 et seq. (1987 and Supp. 1992).

I would apply to all petitioner's claims what I have called a "proximate application" methodology for determining whether they invoke duties "based on smoking and health" - I would ask, that is, whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health. On that basis, I would find petitioner's failure-to-warn and misrepresentation claims both preempted.

III

Finally, there is an additional flaw in the plurality's opinion, a systemic one that infects even its otherwise correct disposition of petitioner's post-1969 failure-to-warn claims. The opinion states that, since 5(b) proscribes only "requirement[s] or prohibition[s] ... 'with respect to... advertising or promotion,"' state law claims premised on the failure to warn consumers "through channels of communication other than advertising or promotion" are not covered. Ante, at 528 (emphasis added); see ante, at 524. This preserves not only the (somewhat fanciful) claims based on duties having no relation to the advertising and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public health agency), but also claims based on duties that can be complied with by taking action

either within the advertising and promotional realm or elsewhere. Thus, if - as appears to be the case in New Jersey - a State's common law requires manufacturers to advise consumers of their products' dangers, but the law is indifferent as to how that requirement is met (i.e., through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find preemption as long *[505 U.S. 504, 555]* as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

I think that is inconsistent with the law of preemption. Advertising and promotion are the normal means by which a manufacturer communicates required product warnings to prospective customers, and by far the most economical means. It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still. As a practical matter, such a "tell-the-consumers-any-way-you-wish" law compels manufacturers to relinquish the advertising and promotion immunity accorded them by the Act. The test for preemption in this setting should be one of practical compulsion, i.e., whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Cf., e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 173 , n. 25 (1978). Though the hypothetical law requiring disclosure to a state regulatory agency would seem to survive this test, I would have no difficulty finding that test met with respect to state laws that require the cigarette companies to meet general standards of "fair warning" regarding smoking and health.

Like JUSTICE BLACKMUN, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision." Ante, at 543-544 (opinion concurring in part and dissenting in part). Must express preemption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or

need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied preemption whenever the statute at issue contains an express preemption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes, *[505* U.S. *504,556]* does "state law" include legal duties imposed on voluntary acts (as we held last Term in Norfolk & Western R. Co.), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.

[Footnote 1] The plurality is joined by Justices BLACKMUN, KENNEDY, and SOUTER in its analysis of the 1965 Act.

[Footnote 2] The Court apparently thinks that, because 4 of the Act, imposing the federal package labeling requirement, "itself sets forth a particular statement," ante, at 519, n. 16, 5(b), the advertising preemption provision must be read to proscribe only those state laws that compel the use of particular statements in advertising. Besides being a complete non sequitur, this reasoning proves too much: the similar prescription of a particular warning in the 1969 Act would likewise require us to confine the preemptive scope of that later statute to specific, prescriptive "requirement[s] or prohibition[s]" (which, I presume, would not include tort law obligations to warn consumers about product dangers). And under both the 1965 and 1969 versions of the Act, the package labeling preemption provision of 5(a), no less than the advertising preemption provision of 5(b), would have to be limited to the prescription of particular language, leaving the States free to impose general health labeling requirements. These results are obviously contrary to the Act's stated purposes. *[505* U.S. *504,557]* of 25

EXHIBIT B

Filed 8/5/02 (Publishers: This opinion should follow the companion case, *Myers v. Philip Morris Companies, Inc.)*

IN THE SUPREME COURT OF CALIFORNIA

JOSEPH NAEGELE, as Trustee, etc., et at,)
)
Plaintiffs and Appellants,)
)
v.)
)
RJ. REYNOLDS TOBACCO COMPANY et at,)
)
Defendants and Respondents.)

S090420
Ct. App. 1/1 A084367

San Francisco County
Super. Ct. No. 992230

RICHARD DONALDSON,)
)
Plaintiff and Appellant)
)
v.)
)
R.J. REYNOLDS TOBACCO COMPANY et at,)
)

Defendants and Respondents.

Ct. App. *1/1* A084371

San Francisco County
Super. Ct. Not
992223/992217

Tobacco-related illnesses are a leading cause of death in this state and worldwide, and these debilitating illnesses have imposed enormous costs on tobacco users, their families, and society. (See, e.g., Health & Sat Code, § *104350,* subd. (a).) Although the risk of illness and death from tobacco use has become increasingly well known in recent decades, tobacco consumption continues to be widespread, at least in part because tobacco contains nicotine, a substance the Surgeon General of the United *States* has determined to be addictive. (U.S. Surgeon Gen. Rep., The Health Consequences of Smoking:

Nicotine Addiction (1988), <www.cdc.gov/tobacco/sgrj 988 .htm> [as of Aug. *5,* 2002].) In 1987, the California Legislature enacted former section 1714.45 of California's Civil Code1 (which we here sometimes refer to as the Immunity Statute) stating that in a product liability action a court could not require a manufacturer or seller to pay damages for injuries caused by certain products, including tobacco products, that are inherently unsafe and known to be unsafe by the ordinary consumer of that product. (Stats. 1987, ch. 1498, § 3, p. *5778* (hereafter sometimes former section 1714.45).) Ten years later, the Legislature repealed the Immunity Statute as it applied to manufacturers of tobacco products. (Stats. 1997, ch. *570,* § 1.)

In the companion case *of Myers v. Philip Morris Companies, Inc.* (Aug. *5,* 2002, *S0952* 13) __ Cal.4th *ó (Myers),* we consider how the repeal of the statutory immunity affects the liability of tobacco manufacturers for injuries caused by tobacco use before, during, and after the 10-year period during which the Immunity Statute was in effect. In *Myers,*

we hold that, because the repeal was not retroactive, the Immunity Statute continues to provide an immunity for tobacco companies in product liability actions, but only for conduct they engaged in during the 10-year period when the Immunity Statute was in effect3 The liability of tobacco companies based on their conduct outside the 10-year period is governed by general tort principles.

1 Further undesignated statutory references are to the Civil Code.

2 As in *Myers*, we use the term "immunity" rather loosely to describe the effect of a law that declares certain described conduct not to be a legal wrong or tort, and thus not a basis for liability.

Here, we are asked to decide what *forms of conduct* by tobacco companies during the 10-year immunity period come within the protection conferred by the Immunity Statute. The Court of Appeal held that as applied to liability for injuries caused by tobacco products, the Immunity Statute covers all conduct by tobacco companies acting as manufacturers or sellers of tobacco products except conduct resulting in manufacturing defects or breach of express warranty. We, however, conclude that the Immunity Statute's protection is not so broad and that it does not extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking.

I

Plaintiff Edwin Brigham smoked cigarettes from 1950 until 1996, when he was diagnosed with lung cancer. He sued defendants RJ. Reynolds Tobacco Company and Brown & Williamson Tobacco Corporation seeking personal injury damages on theories of negligence, product liability, and fraud. Defendants demurred, citing the Immunity Statute as a bar to all of plaintiff's causes of action. The trial court sustained defendants' demurrer but granted plaintiff leave to amend the complaint.

When defendants thereafter demurred to plaintiff's first amended complaint, the trial court sustained the demurrer and dismissed plaintiff's lawsuit against defendants. On plaintiff's appeal, the Court of Appeal affirmed? We granted plaintiff's petition for review.

3 Plaintiff died while the appeal was pending, and the Court of Appeal panted the application of Joseph Naegele and others as trustees to substitute for plaintiff. For simplicity's sake, we refer to both Brigham and the trustees as plaintiff.

II

At issue here is what types or categories of conduct by tobacco companies fall within the immunity given to them by the Immunity Statute, which was in effect from January 1, 1988, until December 31, 1997. The statute specifies that the immunity it gives to manufacturers and sellers of specified inherently unsafe products, including tobacco, applies in product liability actions. (Former

§ 1714.45, subd. (a), Stats. 1987, ch. 1498, § 3, pp. 5778-5779.) The statute defines a product liability action as "any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty." (*Id.*, subd. (b), Stats. 1987, ch. 1498, § 3, p. 5779.)4 Therefore, the immunity conferred by the Immunity Statute does

not cover liability for manufacturing defects in tobacco products or to a tobacco *(Fn. Continued from previous page)*

The Court of Appeal also consolidated plaintiffs appeal for purposes of oral argument with that of Albert J. Pavolini, who had likewise claimed in his lawsuit that he suffered personal injury caused by smoking cigarettes. When Pavolini died, the Court of Appeal substituted his successor in interest, Richard Donaldson, as plaintiff in that case. Because Donaldson did not seek review here, we do not further discuss that consolidated matter.

Former section 1714.45 provided: "(a) In a product liability action, a manufacturer or seller shall not be liable if: ¶ (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and ¶ (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment in Section 402A of the Restatement (Second) of Torts. ¶ (b) For purposes of this section, the term 'product liability action' means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty. ¶ (c) This section is intended to be declarative of and does not alter or amend existing California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal. 3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988." (Italics added.)

company's breach of an express warranty, but otherwise it appears in general to cover all liability for injury or death caused by tobacco products.

Additional limitations on the scope of the immunity may be deduced from the history and purpose of the Immunity Statute, which we examined in detail in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal. 4th *985 (Richards)*, a unanimous decision. The statute's express premise, we said, was "that suppliers of certain products which are 'inherently unsafe,' but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge." *(Id.* at p. 1002.) We described the Immunity Statute as based on the principle that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user." *(Id.* at p. 999, italics omitted.) Thus, as applied to tobacco products, the Immunity Statute was intended to protect tobacco companies from liability for their conduct as manufacturers and sellers of products containing tobacco that is pure and unadulterated, when the claim seeks damages for personal injuries or death resulting from

dangers or risks that are commonly known to be inherent in tobacco products.

We now apply this understanding of the purpose and scope of the Immunity Statute to the allegations of plaintiffs first amended complaint, which seeks damages from defendant tobacco companies for plaintiffs lung cancer, which was diagnosed in October 1996. At that time, plaintiff had smoked cigarettes regularly since *1950*. His complaint alleged causes of action for negligence, product liability, and various theories of fraud, based, in part at least, on defendants' conduct in manufacturing and distributing cigarettes during the statutory immunity period.

Plaintiff argues that the Immunity Statute bars only product liability claims and not claims based on fraud. According to plaintiff a fraud claim is one that challenges the propriety of defendants' conduct, while a product liability claim is one that assails the safety of defendants' products.

The Court of Appeal rejected plaintiff's proposed distinction between fraud and product liability claims as "of no consequence in interpreting [the Immunity Statute], because the Legislature supplied its own expansive definition of... 'product liability' actions." As defined by the Legislature in the Immunity Statute, a product liability action is "any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty." (Former § 1714.45, subd. (b).) Relying on that language, the Court of Appeal stated: 'The Legislature's plain language compels the conclusion that whether based on allegations or theories of fraud, negligence, or manufacture of an inherently unsafe product, an action in which a plaintiff seeks damages for personal injury or death caused by a tobacco product clearly is a 'product liability' action within the meaning of the statute." Thus, the Court of Appeal held, the Immunity Statute bars each

of plaintiff's various claims that defendant tobacco companies defrauded the public about the safety of their products and the risks of tobacco use.

We agree with the Court of Appeal that under the Immunity Statute's broad definition of product liability lawsuits, it makes no difference whether a claim seeking damages for personal injury or death" caused by a tobacco product is labeled as one for negligence, manufacture of an inherently unsafe product, or fraud. But we disagree with the Court of Appeal that the Immunity Statute precludes plaintiff's recovery under all of his fraud allegations.

As we explained in Richards, which we discuss at length in the companion case of Myers, supra, ó Cal 4th___the Immunity Statute drew "its express inspiration from product liability principles addressed by section 402A of the Restatement Second of Torts (Restatement), and particularly comment I thereto (comment I)." (Richards, supra, 14 Cal.4th at p. 999, citing former § 1714A5, subd. (aX2).) We observed: "Section 402A of to Restatement proposes generally that when a manufacturer or distributor sells a product 'in a defective condition unreasonably dangerous to to user or consumer' [citation], and to product reaches that person, as expected and intended, without substantial change in its condition, to seller is 'subject to liability' for physical harm 'thereby caused to to ultimate user or consumer.' "(Richards, supra, at p. 999, italics deleted.)

We went on to say in Richards: "However, comment i asserts an important qualification of the general ~e.... Comment I makes clear that, under the Restatement formulation, '[t]he rule [of liability] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer.' (Restatement, p. 352, italics added.) As comment ithen explains, '[m]any products cannot possibly be made entirely safe for all consumption,' but if a product is pure and unadulterated, its inherent or unavoidable danger; commonly known to

the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.

"Thus, comment I observes, '[o]rdinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture,' but this is not what the Restatement means by 'unreasonably dangerous.' 'Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics.... Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful

.... Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks....' (Restatement, pp. 352-353, italics added.)" (Richards, supra, 14 Cal.4th at p. 999, some italics added in first par.) Richards added: "The clear premise of comment i is that no 'liability' arises under the circumstances therein described because there is no sound basis for liability. In other words, comment i posits, a manufacturer or seller breaches no legal duty to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers."

(Richards, supra, 14 Cal.4th at p. 1000.)

Thus, as we explained in Richards, the Immunity Statute applied with respect to 'pure and unadulterated" tobacco products (that is, products whose contents consumers "desired to buy and ingest'), notwithstanding that the

"inherent or unavoidable danger[s]" of those products were '~commonly known to the community." (Richards, supra, 14 Cal.4th at pp.999-1000, italics added.)

Accordingly, the statutory immunity does not shield a

tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itselfóthat is, if some adulteration of the product made it unreasonably dangerous.

In this cm, the trial court relying on the Immunity Statute sustained defendants' demurrer top~~s first amended complaint, which included four theories of recovery based on alleged fraud by tobacco companies. For the limited purpose of reviewing that ruling with respect to those four theories of recovery, we treat the first amended complaint's allegations as true. (Kasky v. Nike (2002)27 Cal.4th 939,946.)

The trial court was wrong that the Immunity Statute required it to sustain defendant tobacco companies' demurrer to two causes of action alleged in plaintiff's first amended complaint In one of these, plaintiff alleges that defendants 'manipulat[ed] the addictive properties of cigarettes ~... additives," and in the other he asserts that defendants "control[led] nicotine delivery to the smoker, through adding ammonia." The essence of these allegations is that defendant tobacco companies adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Because, as we have explained, the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself, the Immunity Statute does not bar these claims.

But the trial court was correct to sustain defendant tobacco companies' demurrer to two other fraud claims alleged in plaintiff's first amended complaint, to the extent those claims were based on conduct by tobacco companies during the immunity period. (The concurring and dissenting opinion, however, would allow plaintiff to pursue these two claims.)

The complaint alleges that defendants "control[led] the nicotine content of their cigarettes... by developing high-nicotine tobacco and blended tobacco." Because nicotine is naturally present m tobacco, the risks associated with nicotine are inherent in tobacco products. Therefore, an allegation that defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco does not avoid the bar of the Immunity Statute because it does not allege that defendants exposed plaintiff to a risk other than those inherent in tobacco products.

The state Court of Appeal reached a similar conclusion in American Tobacco Co. v. Superior Court (1989)208 Cal.App.3d 480 (American Tobacco), a decision authored by Presiding Justice J. Anthony Kline. Although it observed that the Immunity Statute's protection would not extend to risks caused by "unknown dangerous elements" in a tobacco product (id. at p. 490, fn. 5), the Court of Appeal rejected the plaintiffs' contentions in that cm that the word "tobacco," as used in the Immunity Statute, applied only to unprocessed tobacco leaves rather than to cigarettes: "The Legislature could not have intended to limit the statute topure tobacco any more than it intended 'alcohol' [another product listed in the Immunity Statute] to apply only top~ alcohol and not to beer, wine and other liquors, which are the forms in which alcohol commonly is consumed." (Ibid.)

Plaintiff's first amended complaint further alleges that defendants 'lied about the addictive nature of smoking," in "a campaign designed to deceive the public, plaintiff the government, and others as to the health hazards of smoking." According to the complaint, this deception began before 1969, when the federal government first banned certain cigarette advertising, and it continued after 1969, when defendants "disseminate[d] deceptive, erroneous, misleading and false statements" about the 'health hazards" and "addictive nature" of smoking cigarettes. These allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other

than those inherent in cigarette smoking. Thus, to the extent they pertain to conduct by tobacco companies during the immunity period, these allegations fall squarely within the reach of the Immunity Statute, which, during its effective dates from January 1, 1988, until December 31,1997, shielded tobacco companies against product liability "for injury or death" caused by pure and unadulterated tobacco products. As this court explained in Richards, the Legislature enacted the Immunity Statute to protect manufacturers and sellers of certain inherently dangerous products, including cigarettes, from liability for injuries caused by those products precisely because the Legislature itself had concluded "the public desires to buy and ingest [those products] despite general understanding of [their] inherent dangers." (Richards, supra, 14 Cal. 4th at p. 1000.)

According to the concurring and dissenting opinion, the Immunity Statute does not bar plaintiff's fraud claim based on allegations that defendant tobacco companies deceived the public about the addictive nature of nicotine because smokers generally were not aware of the specific health risks of cigarette smoking. But in American Tobacco, supra, 208 Cal.App.3d 480, decided the year after the Surgeon General issued his report concluding that nicotine is addictive, the Court of Appeal soundly rejected essentially the same argument. It explained: "[T]here is no requirement under [the Immunity Statute] that consumers fully appreciate all the risks involved in the use or consumption of [a particular] product[].... [I]t is sufficient if the ordinary consumer knows the product is 'unsafe.'" (Id. at p. 490, fn. 5.)

III

From January 1, 1988, and lasting through December 31, 1997, California's Legislature, by its enactment of the Immunity Statute, protected tobacco companies from product liability lawsuits by smokers. Here, plaintiff was a cigarette smoker for 46 years (from 1950 through 1996). He

argues that the immunity does not apply to defendants' conduct during the 37 years he smoked before January 1, 1988, the effective date of the Immunity Statute. We agree.

As we hold in the companion case of Myers, supra, ___ Cal.4th ___,the Immunity Statute governs conduct of tobacco companies during the immunity period, which began on January 1, 1988, and ended on December31, 1997. But when, on January 1, 1998, the California Legislature's repeal of that immunity took effect, the Legislature restored the common law principles that had, until enactment of the Immunity Statute, governed tort liability against tobacco companies. Thus, the Immunity Statute provides no protection to tobacco companies for conduct that occurred before the statute's 10-year period of immunity.

Regarding defendants' conduct during the statutory immunity period, we conclude that the Immunity Statute bars plaintiffs claims, however labeled, where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes. But the Immunity Statute does not bar plaintiffs claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Nor does the Immunity Statute shield tobacco companies from liability for conduct outside the immunity period.

DISPOSITION

We reverse the judgment of the Court of Appeal and remand to that court for reconsideration of plaintiffs appeal in light of our conclusions here and in the companion case *of Myers.*

KENNARD, I

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

CHIN, J.

BROWN, J.

CONCURRING OPINION BY BROWN, J.

I agree with the majority that plaintiffs (see maj. opn., *ante,* at p. 3, fn. 3) causes of action alleging defendants manipulated the addictive properties of cigarettes by adding ammonia should survive demurrer. I write separately to express my concern that the majority has extended the immunity of Civil Code section 1714.45 (section 1714.45) only to products that are "pure and unadulterated" (maj. opn., *ante,* at pp. 5, 8-1 1), imposing a standard that is vague and misleading as well as potentially inconsistent with legislative intent.'

Any product processed with one or more additives and thus no longer in its raw or natural state is arguably not "pure and unadulterated"; but that was not how we used the term in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th *985 (Richards).* In *Richards,* the court did not formulate a standard for determining the scope of section 1714.45 immunity but addressed the more fundamental question of the basis for statutory immunity. We explained that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability

1 Although this case arises under former section 1714.45, which

included tobacco as one of the "common consumer product[s]" exempted from product liability actions under the conditions described (Stats. 1987, ch. 1498, § 3, p. 5778), the majority's standard will apply equally to the current version of section 1714.45, which continues to extend immunity to numerous other products. (See § 1714.45, subd. (a)(2).) This breadth of application makes formulation of the proper standard particularly critical.

for resulting harm to a voluntary user." (*Richards*, at p. 999, italics omitted.) As the analysis in *Richards* makes clear, this reference to "pure and unadulterated" must be read with reference to comment *i* of section 402A of the Restatement Second of Torts (Restatement), from which section 1714.45 "draws its express inspiration... ." (*Richards*, atp. 999; see § 1714.45, subd. (a)(2).)

Comment *i* qualifies the general rule of liability for unreasonably dangerous products: "Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous." (Rest., § 402A, corn. *i*, pp. 252-253.)

From this explanation, we can reasonably infer that the

Legislature did not extend section 1714.45 immunity to products that are contaminated, perhaps through improper storage or transport, or contain some ingredient making them unfit for ordinary consumption. Such contamination, however, is not the same as processing a "pure and unadulterated" product as by incorporating additives to make it more palatable or appealing to the consumer.

In today's high technology economy, such adulteration is common practice-even in common consumer products one might reasonably assume are "pure and unadulterated" (see, e.g., 7 C.F.R. § 205.605 [listing several dozen nonsynthetic and synthetic substances that "may be used as ingredients in or on processed products labeled as 'organic' "]) but it does not result in products that would fall outside the immunity of section 1714.45. For example, most wines do not contain "pure and unadulterated" grapes but have sulfites added to discourage bacterial growth as the wine ferments. Sulfur-based preservatives prevent discoloration in the drying of "pure and unadulterated" fruits such as apricots. Nitrites and nitrates preserve flavor and delay the development of toxins when used to cure "pure and unadulterated" meats for bacon and ham. By the same reasoning, consumers generally do not buy unprocessed tobacco but cigarettes, which may contain nontobacco additives that make them more attractive to the consumer. That processing does not *necessarily* make the tobacco adulterated, i.e., contaminated, even if the product is no longer "pure and unadulterated." Thus, to the extent such cigarettes meet consumer expectations, they would not be unreasonably dangerous as contemplated by comment *i* and should come within the statutory immunity.

This conclusion is fully consonant with our reasoning in *Richards*, irrespective of the passing reference to a product that is "pure and unadulterated." As the court went on to explain, "Like comment *i*, section 1714.45 negates 'liab[ility]' to voluntary users for the mere manufacture or

sale of 'common consumer product[s] intended for personal consumption,'.., which are 'inherently unsafe' and are understood to be so by 'ordinary knowledge common to the community,' but which are nonetheless consumed with such ordinary knowledge. Like the Restatement, the statute thus precludes 'liab[ility]' for the furnishing of such products on grounds that *under the circumstances described in the statute,* their 'inherent' dangers do not make them 'defective' when used as intended by voluntary consumers who are aware of the risks.... In other words, under the conditions described by section 1714.45, a tobacco supplier simply commits no tort against knowing and voluntary smokers by making cigarettes available for their use." (*Richards, supra,* 14 Cal.4th at p. 1000, italics added, original italics omitted.)

Thus, in *Richards,* we hewed to the statutory language, as informed by comment *i,* in defining liability under former section 1714.45. In my view, we should do the same in articulating the scope of the immunity and not engraft a "pure and unadulterated" standard. This is not to say that some additives may not give rise to unique dangers that take a product outside the statutory definition; but we should not adopt a standard that will potentially sweep too many cases within its ambit. I therefore agree with the majority that plaintiffs action may proceed on the theory that the addition of ammonia or other additives to cigarettes posed some *independent risk* not within the "ordinary knowledge common to the community" about the dangers of tobacco. (Former § 1714.45, subd. (a)(2).) Plaintiff, of course, will have to prove that case.

BROWN, J.

CONCURRING AND DISSENTING OPINION BY WERDEGAR, J.

I agree with the majority that the immunity conferred by Civil Code former section 1714.45 (Stats. 1987, ch. 1498, § 3, p. 5778) (the Immunity Statute) bars plaintiffs claims

"where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes" (maj. opn., *ante,* at p. 11), insofar as that holding is limited, as the statute requires, to dangers or risks commonly known to the community and to conduct within the immunity period.' I further agree that such immunity "does not extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (Maj. opn., *ante,* at p. 3.)

I disagree with the majority that the Immunity Statute does not permit recovery based on plaintiffs allegations that "defendants 'control[led] the nicotine content of their cigarettes.., by developing high-nicotine tobacco and blended

1 The Immunity Statute applied to certain conduct occurring from January 1, 1988, to December 31, 1997 (the immunity period), so that no product liability cause of action may be based on that conduct, regardless of when the users of covered products may have sustained or discovered injuries caused thereby. An amended version of Civil Code section 1714.45, enacted in 1997 (Stats. 1997, ch. 570, § 1), eliminated any immunity for tobacco manufacturers. (See *Myers v. Philli~ Morris Companies, Inc.* (Aug. 5, 2002, S0952 13) __ Cal.4th *ó, ó* [pp. 2-3].)

tobacco' "(maj. opn., *ante,* at p. 9) and" 'lied about the addictive nature of smoking' "(*id.* at p. 10, quoting the operative first amended complaint). The majority rests here on the assertion that "[t]hese allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other than those inherent in cigarette smoking" (*id.* at p. 10; see also *id.* at p. 9), but that is beside the point. The allegations *do* suggest that the cigarettes plaintiff smoked exposed him to dangers beyond those commonly known to be associated with cigarette smoking. They therefore fall outside the Immunity Statute which, as the majority acknowledges, does not extend to such allegations. (Maj. opn., *ante,* at p. 3.)2

The Immunity Statute provided in pertinent part that, "(a) In a product liability action, a manufacturer or seller shall not be liable if: ¶ (1) The product is inherently unsafe and

the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and ¶ (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment ito Section 402A of the Restatement (Second) of Torts." (Civ. Code, former § 1714.45, Stats. 1987, ch, 1498, § 3, pp. 5778-5779.)

As the majority acknowledges, in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 *(Richards)* we described the Immunity Statute as "based on the

2 I agree with the majority that on demurrer "an allegation that defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco does not avoid the bar of the Immunity Statute [as part of a theory] that defendants exposed plaintiff to a risk *other than* those inherent in tobacco products." (Maj. opn., *ante,* at p. 9.) As I explain more fully below, however, such an allegation *may* avoid the bar of the Immunity Statute as part of a theory that defendants exposed plaintiff to a product not "known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." (Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch. 1498, § 3, p. 5778.)

principle that 'if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.'" (Maj. opn., *ante,* at p. 5, quoting *Richards, supra,* 14 Cal.4th at p. 999.) Here, the crux of plaintiffs allegations respecting consumer knowledge at relevant times is that defendants' products posed dangers other than those commonly known to be inherent in cigarette smoking. Thus, plaintiff alleges in detail that defendants carried out a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking, including the addictive nature of smoking, to conceal the results of their own research, and to misrepresent their actual role in manipulating the addictive properties of cigarettes via nicotine and other additives.

Plaintiff alleges that defendants conspired to deceive the government and the consuming public (including plaintiff himself) by a variety of means. For example, according to plaintiff defendants established, funded and publicized tobacco industry "research" bodies, which they touted as unbiased and trustworthy, and thereafter falsely represented to plaintiff and others that emerging questions about smoking and health would be truthfully answered by these bodies.[3] Defendants also conspired to coordinate their responses to any statements by the Surgeon General or to other governmental action. In furtherance of that conspiracy, plaintiff alleges, defendants "concealed their actual knowledge concerning their own negative health and addiction research results and their manipulation and control of the nicotine content of their products to create and

3 Plaintiff alleges activities by the Tobacco Institute, the Tobacco Industry Research Committee, the Tobacco Research Council, Tobacco Research U.S.A., Inc., and the Council for Tobacco Research.

perpetuate smokers' addiction to cigarettes..... Before 1969 (when certain cigarette advertising was banned), defendants placed "deceptive, erroneous, misleading, and false advertisements" in all media "designed to conceal to true health hazards and addictive nature of cigarettes and to lure new, especially youthful, users to replace to older ones who died." After 1969, defendants "continued to disseminate deceptive, erroneous, misleading, ad false statements concerning to state of to medical research concerning cigarettes ad to diseases toy, as well as to health hazards and addictive nature of cigarettes ... At relevant times, plaintiff also alleges, defendants abused legal processes "to misdirect what purported to be objective scientific research to create favorable, and to suppress unfavorable, findings regarding to halt consequences of smoking."

Throughout to immunity period, according to plaintiff

defendants thus aimed "to intentionally frustrate to flow of information fr6m to medical and scientific community to the general public on to halt risks and addictive nature of cigarettes." Defendants allegedly "controlled, and continue now to control nicotine content of their cigarettes... and engineer their cigarettes to control nicotine delivery to the smoker.... They ten concealed their knowledge of to addictive nature of nicotine and of their manipulation of nicotine levels and delivery. Defendants have denied, and continue to deny publicly that nicotine is addictive, or that toy attempt to or do achieve levels of nicotine in their products to create or sustain addiction." Defendants' well-funded and deceptive public relations campaign, including "literally hundreds of misrepresentations to plaintiff and others over to course of to last 40 years," plaintiff alleges, 'resulted in plaintiff being unaware" of "the extent to which smoking presented a serious hazard to his health, [or] that to nicotine therein would addict him to smoking ... . " Indeed, as has been noted, "The tobacco industry has repeatedly told to public that nicotine is not addictive. Most specifically and most dramatically, at a congressional hearing on April 14, 1994, seven tobacco company CEOs each in turn stated that nicotine is not addictive." (Glantz et al., The Cigarette Papers

(1996) p. 100.)4

In short, plaintiff alleges, "[t]he addictive effect of nicotine has long been known and concealed by the defendants." Despite their secret knowledge, defendants "intentionally conspired to mislead, deceive and confuse the government, and the public, including plaintiff concerning the harmful and debilitating effects smoking has on the health of individuals, that nicotine in cigarettes is a powerfully addictive substance, and that defendants intentionally manipulate levels of nicotine delivery in cigarettes to ensure that smokers remain addicted." "One of the goals of the conspiracy," plaintiff alleges, "was to create a false controversy regarding the health hazards of tobacco use and the addictive properties of nicotine in

order to protect the market for cigarette sales and the profits of the tobacco industry" defendants. Consequently, plaintiff alleges, despite the availability of some governmental information respecting smoking and addiction, "[a]t times material, the ordinary consumer, including the plaintiff, did not in the exercise of ordinary diligence know of the likelihood of, the severity of, or the risks from" cigarettes.

4 See generally Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg* (2001) 31 Seton Hall L. Rev. 631, *635*, wherein the author notes that in a recent book former federal Food and Drug Administration Commissioner David Kessler cites evidence obtained in litigation "to make his case that the tobacco industry deceived Congress, regulators, and the American people about the addictive nature of its products and its ability to manipulate the nicotine dose delivered by cigarettes to maintain addiction." (See also Kessler, A Question of Intent: A Great American Battle With a Deadly Industry (2001).)

Plaintiff thus plainly alleges *more* than '~personal injury caused by dangers or risks inherent in to consumption of tobacco products such as cigarettes" (maj. opt, *ante,* at p.11); ho alleges tat defendants secretly manipulated to nicotine content of cigarettes to enhance their addictive properties, tus subverting to "ordinary knowledge common to to community," and materially misled to ordinary consumer about cigarettes' addictiveness. (Cf. Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch, 1498, § 3, p. *5778.)*

It is a "fundamental premise" of to Immunity Statute tat ft negates liability only to "knowing and voluntary consumers" of covered products and ten only when to conditions described in to statute including to condition that "the product is known to be unsafe by to ordinary consumer"-obtain. *(Richards, supra,* 14 Cal.4t at p. 1000.) The majority not only acknowledges to point (maj. opn., *ante,* at p. *5),* but relies on ft to conclude tat plaintiff's allegati ns concerning additives fall outside to Immunity Statute (see *id.* at p. 8). But there is no principled way to distinguish for these purposes between plaintiffs allegations tat defendants secretly used additives and his

allegations that defendants secretly manipulated and lied about to addictiveness of their product. Both activities allegedly "exposed smokers to dangers beyond those commonly known to be associated wit cigarette smoking" (maj. opn., *ante,* at p. 3); therefore, both fail outside to Immunity Statute.

The majority apparently takes to view that to Legislature in to Immunity Statute declared to dangers of cigarettes to be commonly known as a matter of law. (See, e.g., maj. opt, *ante,* at pp. 4-5.) In suppo4, to majority asserts tat in *Richards, supra,* 14 Cal.4t at page 1000, we "explained" tat to Legislature itself had concluded tat tobacco products automatically qualify for immunity because tore existed" *'general understanding of [their] inherent dangers."*

(Maj. opn., *ante, at p.* 10, italics added.) But that is not what the Immunity Statute says, nor is it the import of what we said in *Richards.*

On its face, the Immunity Statute mentions tobacco (along with sugar, castor oil, alcohol, and butter) only *conditionally,* as a consumer product that *might* qualify for immunity if certain other, separately specified, requirements are met. Thus, tobacco appears in a list of examples of "common consumer product[s] intended for personal consumption" (Civ. Code, former § 1714.45, subd. (a)(2), Stats. 1987, ch. 1498, § 3, p. *5778)* that qualify for immunity if, but only if they meet the requirements set out in subdivision (a)(1), a separate part of the statute. Subdivision (a)(1) requires that any common consumer product proposed for immunity be "inherently unsafe *and...* known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." (Italics added.)

When noting in *Richards* that tobacco was specifically included in the Immunity Statute's list of inherently unsafe "common consumer product[s]," we also carefully noted, in fealty to the statute's plain language, that the statute

precludes liability only "under the circumstances described in the statute" (*Richards, supra,* 14 Cal.4th at p. 1000) including, of course, the circumstance that "the product is known to be unsafe by the ordinary consumer" (Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch. 1498, § 3, p. 5778).

Even if, as the majority asserts, and contrary to the statute's plain language, the Legislature in enacting the Immunity Statute intended to deem, as a matter of law, that the consuming public had a" 'general understanding' "of tobacco's inherent dangers (maj. opn., *ante,* at p. 10), any such intent logically could have encompassed at the most only those dangers of tobacco that had been publicly reported by the time the Immunity Statute was enacted in 1987. But in the period leading up to and at the outset of the immunity period, the predominant public document informing consumers about to addictiveness of tobacco was to Surgeon General's 1964 Report on Smoking and Health (Surgeon Gen. Advisory Coin. Rep., Smoking and Health (1964) (1964 Report)). Significantly, tat report concluded that tobacco use "should be characterized as an habituation *rather than an addiction."* (*Id.*, ch. 4, p. 34, italics added.) The 1964 Report actually *minimized* to health hazards of nicotine in cigarettes, arguing tat "the chronic toxicity of nicotine in quantities absorbed from smoking and other methods of tobacco use is very low and probably does not represent an important health hazard." (*Id.*, ch. 4, p. 32.)

Not until 1988, one year *after* to Immunity Statute was enacted, did to Surgeon General state unequivocally tat cigarettes and other forma of tobacco are addicting and tat nicotine is to drug in tobacco that causes addiction. (See Centers for Disease Control and Prevention, Dept Health & Human Services, The Health Consequences of Smoking: Nicotine Addiction (1988); see also www.cdc.gov/tobacco/sgrpago.htm [as of Aug. 5,2002].) Moreover, that to delivery to Congress in 1988 of a medical report on tobacco's addictiveness conferred on other to

California Legislature or California consumers a general understanding of tobacco's addictive properties does not necessarily follow. In any event since neither to public nor to Legislature could possibly have known about dangers of tobacco use that wore discovered or disclosed only *after* to Immunity Statute was enacted, to Legislature cannot have intended to bar suits based on such dangers.

Contrary to the majority's implication, to *addictive* property of a substance is qualitatively different from a mere "health risk~' attendant upon its ingestion.

(See maj. opn., *ante,* at pp. 10-11, citing *American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480.) As discussed, plaintiff alleges tat, as a consequence of defendants' misleading conduct, ho and other ordinary consumers did *not* during the immunity period appreciate the relevant risks, specifically the risk of addiction, involved in to use or consumption of tobacco. Moreover, once a individual is addicted to a substance, that individual arguably cannot reasonably be deemed a voluntary consumer. Consequently, *American Tobacco, a* Court of Appeal decision issued only at the outset of to immunity period ad five years before to bombshell disclosures about tobacco companies' behavior on which plaintiff's allegations largely are based (see Glantz et at, The Cigarette Papers, *supra,* p. xvii), is of no persuasive value.

The majority improperly denies plaintiff a opportunity to attempt to demonstrate the truth of his allegations respecting the consuming public's knowledge at relevant times. (Maj. opn., *ante,* at pp. 9-10.) Plaintiff's allegations may or may not ultimately be provable, of course, but on review of a grant of demurrer their provability is not relevant since we assume them to be true. *(Kaslcy v. fiSke, Inc.* (2002)27 Cal.4th 939,946; see also *General Dynamics Corp.* i'. *Superior Court* (1994)7 Cal Ath 1164, 1177; maj. opn., *ante,* at p. 8.) Since the Immunity Statute cannot apply if plaintiff's allegations are true, the majority is

mistaken in concluding as a matter of law that the Immunity Statute does not permit recovery based on these allegations. From that conclusion I respectfully dissent.

WERDEGAR, J.

I CONCUR

MORENO, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Naegele v. R.J. Reynolds Tobacco Co.

Unpublished Opinion

Original Appeal

Original Proceeding

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Judge: David A. Garcia

Attorneys for Appellant:

Wartnick, Chaber, Harowitz, Smith & Tigerman, Wartnick, Chaber, Harowitz & Tigerman, Harry F.

Wartnick, Madelyn J. Chaber, Phillip Scott Chan; Law Offices of Daniel U. Smith, Daniel U. Smith and

Ted W. Pelletier for Plaintiffs and Appellants.

Meyers, Nave, Riback, Silver & Wilson and Andre J. Saltzman for Professor Stephen D. Sugarman as Amicus Curiae on behalf of Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Dennis Eckhart, Assistant Attorney General, and Peter M. Williams, Deputy Attorney General, as Amici Curiae on behalf of Plaintiffs and Appellants.

Attorneys for Respondent:

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, H. Joseph Escher III, Ethan P. Schulman, Keith D.

Kessler, Richard Shively and Anne-Marie Eileraas for Defendant and Respondent R.J. Reynolds Tobacco

Company.

Sedgwick, Detert, Moran & Arnold and Frederick D. Baker for Defendant and Respondent Brown & Williamson Tobacco Corporation.

Fred Main for California Chamber of Commerce as Amicus Curiae on behalf of Defendants and Respondents.

William L. Gausewitz for The Alliance of Anierican Insurers, The American Insurance Association, The National Association of Independent Insurers, The National Association of Mutual Insurance Companies and The Reinsurance Association of America as Amici Curiae on behalf of Defendants and Respondents.

Counsel who argued in Supreme Court (not intended for

publication with opinion):

Madelyn Chaber

Wartnick, Chaber, Harowitz, Smith & Tigerman

101 California Street, Suite 2200

San Francisco, CA 94111

(415) 986-5566

H. Joseph Escher III

Howard, Rice, Nemerovski, Canady, Falk & Rabkin

3 Embarcadero Center, 7th Floor

San Francisco, CA 94111

(4150 434-1600

EXHIBIT C

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PATRICIA HENLEY, Plaintiff and Respondent, A086991

V.

PHILIP MORRIS INC., Defendant and Appellant.

(San Francisco County Super. Ct. No. 995172)

** Pursuant to California Rules of Court, rules 976110 and 976.1, this s≥pinion is certified for publication with the exception of parts II, III, IV, V, VI, and VII*

Plaintiff brought this action for personal injuries allegedly sustained as a result of defendant's tortious misconduct in the manufacture and marketing of cigarettes. The jury returned a special verdict awarding plaintiff $1.5 million in compensately damages and *$50* million in punitive damages. The trial court denied defendant's motions for new trial and judgment notwithstanding the verdict, except that it ordered a new trial on punitive damages unless plaintiff consented to reduce the punitive award to *$25* million. Plaintiff consented to the reduction, and defendant filed a timely appeal.

Defendant raises a host of objections, many not preserved for appeal. Its primary contentions are that (1) all of plaintiff's claims are barred by the immunity conferred on tobacco manufacturers from 1988 to 1998 by former Civil Code section *1714.45* (section 1714.45); FN1 (2) the jury was

misinstructed on the limitations imposed on plaintiff's claims by the Public Health Cigarette Smoking Act of 1969, title 15 United States Code section 1331 et seq. (the 1969 Act); (3) each of plaintiff's claims is deficient in various particulars; and (4) the punitive damage award cannot be sustained. We find no prejudicial error, and affirm the judgment.

INTRODUCTION AND BACKGROUND

We begin with a fundamental principle persistently overlooked by defendant: "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) Thus in ascertaining the underlying facts for purposes of appellate analysis, the reviewing court "must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment." (*Id.* § 359, p. 408, italics in original.)

Viewed most favorably to the judgment, the evidence shows that plaintiff, who was born in 1946, began smoking cigarettes in 1961 or 1962, at the age of 15, when she "lit up" with some school friends outside a dance. At that time she felt smoking was "cool" and "grown up," provided the pleasure of the forbidden, made her look older, and served as a "rite of passage." Then and for some years thereafter, nobody told her that cigarettes could cause her serious disease. There were no warnings on cigarette packages or in advertisements. Plaintiff was not taught in school about the dangers of tobacco. As a result she believed that cigarettes, which contained "tobacco, pure and simple," were "not a harmful product." Nor did she know that cigarettes or nicotine could be addicting. Nothing in the advertising she saw suggested that if she started smoking

she might be unable to stop.

The jury could also find that starting no later than December *1953*, defendant and other cigarette manufacturers agreed to act together to counter mounting scientific evidence about the health risks of cigarette smoking. By the time plaintiff began smoking, defendant knew that tobacco contained numerous carcinogenic substances as well as flavoring additives that also produced carcinogenic compounds upon combustion. Tobacco manufacturers were also aware of epidemiological studies that showed a strong correlation between smoking and the incidence of lung cancer. Yet they launched a concerted public relations campaign to deny any link between smoking and serious illness. A major part of this strategy was the creation of a "research institute" that would, as the public was told, attempt to find the truth about smoking and health though in fact it was permitted to conduct very little research that might confirm a link, serving mainly, as the jury was entitled to find, to gather ammunition against tobacco's detractors. Other strategies included manipulating the mass media to suppress or make light of adverse news developments, such as new studies or reports.

The jury could also find that defendant engaged in saturation advertising, much of it consciously targeting the teenage audience from which new ("replacement") smokers had to come. Defendant knew that persons who did not begin smoking during their teen years were unlikely to do so. In particular, defendant sold the brand of cigarette plaintiff preferred, Marlboro, using symbols of the independence, autonomy, and mature strength for which teenagers were understood to yearn. The jury could find that these targeted teenage consumers possessed less critical judgment, and were more receptive to marketing manipulation generally, than might be the case with adults. The jury could find that teenagers who went past the experimentation phase became addicted to tobacco, as a result of which they found it extremely difficult to stop

smoking and often suffered impaired judgment with respect to the consequences of continuing to do so.FN2 The jury could find that the strategy of marketing to teenagers and causing them to become addicted to its products was central to the tremendous success and profitability of the Marlboro brand in particular, helping defendant to become one of the largest and most successful corporations in the world.

In 1966, as evidence of health risks mounted, Congress required that cigarette packages bear the relatively mild warning that smoking "may be hazardous." In the 1969 Act, Congress required a somewhat stronger warning and required that it appear in advertising as well as on packages. At the same time, Congress explicitly preempted any state law imposing a "requirement or prohibition with respect to advertising or promotion" of cigarettes language that has since been construed to preempt many but not all common-law tort claims. Although the warnings have since been further strengthened, this partial federal immunity remains in place, and is one of defendant's major defenses here. (See section II, below.)

In 1988 the tobacco industry acquired a safe harbor under California law when, riding the coattails of a legislative compromise, tobacco was listed among "common consumer products" in former section *1714.45*, a statute construed the following year to create an almost complete "immunity" from tort liability. The Legislature repealed that protection effective January 1, 1998, but defendant contends that it nonetheless applies to defeat most or all of plaintiffs claims here. (See section I, below.)

The jury was entitled to find that well before these legislative defenses became applicable, plaintiff had become an addicted smoker with sharply impaired judgment and will where cigarettes were concerned. Plaintiff testified that on the subject of cigarette smoking and health, "my brain wasn't going to register anything that anybody said." When she saw the first package

warnings, she minimized the perceived "degree[] of danger," thinking to herself that it was also "dangerous to walk across the street." She testified that while she heard the United States Surgeon General was saying things about cigarettes, she also knew "that the tobacco companies were saying different" As a result the package warning "didn't faze me one way or the other. I wasn't going to give the cigarettes up at that point"

Plaintiff's first regular brand of cigarettes was Marlboro, and ft remained her favorite brand throughout almost all of her 35-year smoking history. From age fifteen until she was about 43 years old (around 1989), she apparently smoked one-and-a-half to two packs a day of "Marlboro Red," a brand rated to deliver relatively high amounts of tar and nicotine. At that age, however, she switched to Marlboro Lights, a lower-tar brand, on what the jury was entitled to view as the direct advice of a Philip Morris agent Plaintiff testified that around that time she began to hear that "low-tar cigarettes were better. You wouldn't get as much tar and nicotine and, you know, their advertising on the low-tar cigarettes was really out there. ¶ I'm thinking, 'Welt okay. Maybe there's something to this.' So when I was approximately 43,1 decided that, 'Well, I'll check into this and maybe I'll change from the Reds to the Lights.' ¶ So I did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is ft really true? Is there less tar in this or less nicotine?' ¶ And I was assured at the time that ff1 was concerned that, yes, I could switch to the Lights...." She did so and, in a few weeks, had more or less doubled her intake, to three-and-a-half packs a day.

By mid-October 1997 plaintiff "was feeling really bad" and "down for the count with what I thought was heavy-duty flu." She was diagnosed in February 1998 with small-cell carcinoma of the lung. The jury was more than entitled to find that this affliction was directly caused by cigarette smoking.

I. IMMUNITY UNDER FORMER SECTION 1714.45FN3

A. Nature of Error; Standard of Review.

Defendant contends that the trial court erred by 'refusing to apply" the immunity panted to tobacco manufacturers prior to 1998 by former section 1714.45. This is not an adequate specification of error. (See 9 Witkin, Cal. Procedure, supra, Appeal, § 340,

p. 382 [court reviews trial court's actions, not reasoning]; *Pittman v. Boiven* (1967) 249 Cal.App.2d 207,215 ["It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby.']; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ~'ft is not the burden of this court to act as counsel for either party and we will not assume the task of making a search for

Troen Page4of44error"]; *segaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218,229 [refusing to consider claims of attorney misconduct unaccompanied by record references].) However, defendant elsewhere notes that the trial court denied a motion for nonsuit based on former section *1714.45.* This is a specific and reviewable ruling. Other matters to which defendant alludes in this regard are not for various reasons, cognizable grounds for reversal.FN4

Defendant was entitled to nonsuit if "as a matter of law, the evidence presented by plaintiff [was] insufficient to permit a jury to find in [her] favor." (*Nally* i'. *Grace Community Church* (1988)47 Cal.3d 278,291.) Since this is an issue of law, we review it de novo, employing the same standard as the trial court. *(Saunders* i'. *Tqylor* (1996)42 Cal.App.4th *1538,* 1541-1542.) For present purposes it is not seriously disputed that the evidence was sufficient to support findings that plaintiff started smoking cigarettes in the early 1960s and continued to do so until late 1997, as a result of which she contracted lung cancer. Although

defendant makes a half-hearted attempt to cast the point in doubt we infer in support of the judgment that plaintiff did not and could not reasonably discover her cancer before early 1998, when she was diagnosed with that illness and told that it resulted from cigarette smoking. The question thus presented is whether former section 1714.45 precluded the imposition of liability on defendant for plaintiff's injuries as a matter of law. We hold that it did not

B. Former Section 1714.45.

Defendant relies on former section 1714.45 as in effect from January 1, 1988, to January 1, 1998. At that time the statute provided that a manufacturer or seller could not be liable in a "product liability action" for injuries caused by a product if the product was "inherently unsafe," was 'Thown to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community," and was "a common consumer product intended for personal consumption, such as... tobacco... ." (Former section 1714.45, subd. (a); Stats. 1987, ch. 1498, § 3, pp. 5778-5779.) "[P]roduct liability action" was defined as "any action for injury or death caused by a product exact... an action based on a manufacturing defect or breach of an express warranty." (*Id.*, subd. (b).)

In 1989 Division Two of this court described former section 1714.45 as a "poorly drafted statute" that failed to convey a single" 'plain meaning' "but "[o]n the contrary," was "on its face amenable to two diametrically opposed interpretations, each of which conflicts in

some significant way with the words the Legislature used." (*American Tobacco Co. v.,Superior Court* (1989) 208 Cal.App.3d 480,485 (*American Tobacco).)* The court nonetheless concluded that the statute created an "immunity" for manufacturers of the enumerated products that was both "automatic" (*Id.* at p. 486) and

"nearly complete" (*Id.* at p. 487). The breadth of this reading may have been cast in some question by *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, which held that in an action for damages resulting from lung disease, an asbestos manufacturer could not reduce its own "comparative responsibility" under Proposition 51 (Civ. Code, § 1431 et seq.) by seeking to attribute a share of responsibility to an absent tobacco company. The court confirmed that former section 1714.45 "immunized" tobacco suppliers. (*Id.* at pp. 1000, 1001, 1003, fn. 8.) At the same time, the court seemed to reserve judgment on the scope and extent of the immunity provided. (*Id.* at pp. 999, 1003, fn. 8.)

The year after *Richards* was decided the Legislature itself undertook to amend former section 1714.45 as it affected tobacco products. From these efforts emerged two statutes. The first added a subdivision (d) to the former statute declaring that it posed no impediment to actions by public entities to recoup the cost of benefits provided to persons injured by tobacco products. (Stats. 1997, ch. 25, § 2, p. 230.) We are more concerned with the second amendment, Senate Bill No. 67, ultimately chaptered as Statutes 1997, Chapter 570 (SB 67). Because it was not an urgency measure, it took effect on January 1,

1998. (See Gov. Code, § 9600, subd. (a).) It made the following changes to former section

1714.45: (1) deleted tobacco from the list of products in subdivision (a); (2) inserted a new subdivision (b), stating that the statute did not "exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions"; (3) modified and renumbered (as subdivision (e)) subdivision (d), which had just been added as noted above; (4) inserted a new subdivision (f) declaring a legislative intention to abolish any "statutory bar" to claims by persons "who have suffered or incurred injuries" and to ensure that "claims which were or are brought" would be "determined

on their merits"; and *(5)* inserted a new subdivision (g) declaring section 1714.45 inapplicable to "tobacco industry research organization[s]." (§ 1714.45.) Accompanying the amendment was a further uncodified declaration of legislative intent. (Stats. 1997, ch. 570, § 2.) SB 67 thus effected a *repeal* of section 1714.45 insofar as it had conferred an immunity on tobacco manufacturers, their successors, and tobacco industry research organizations. The term "repeal" appears in the one-sentence "summary~~ or "digest" in nearly all of the committee and floor reports. (E.g., Sen. Coin. on Judiciary, Rep. on Sen. Bill No. 67 (1997-1998 Reg. Sess.) as amended Feb. 14, 1997 liThis bill would repeal the current immunity conferred upon manufacturers and sellers of tobacco products, as specified in Civil Code Section 1714.45, for products liability."].)

C. Effect of Statute.

3 4

1. Express Terms.

The question presented, then, is whether the 1998 repeal of the immunity formerly granted to tobacco manufacturers by former section *1714.45* applies to permit plaintiff's suit Innumerable authorities acknowledge a general" 'presumption' "against giving retroactive effect to statutory changes (e.g., *Buttram* i'. *Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th *520, 536,* fn. 6, quoting *Landgrafv. USI Film Products* (1994)511 U.S. 244,265), but beyond that the jurisprudence of statutory retroactivity is a dense conceptual jungle. We have elected to more or less follow the analytical approach taken

in *Landgraf supra,* 511 U.S. at p. 280. In that approach, the first task is to determine whether the enacting body "has expressly prescribed the statute's proper reach." *(Thid.)* If ft has, there is no occasion to resort to 'judicial default rules." *(Thid.;* see *Western Security Bank v. Superior Court*

(1997) 15 Cal.4th 232, 243 when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us'].) Only if the statute lacks an express directive must the court attempt to determine "whether the new statute would have retroactive effect" for purposes of the judicial presumption. *(Landgraf supra,* 511 U.S. at p. 280) In short, we need not decide whether application of the change to a particular state of facts would be "retroactive" if the statute plainly calls for such application.

We have concluded that the statute here expressly calls for application to the present case. Subdivision (f) of section 1714.45 (subdivision (1)) states, "It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that *there exists no statutory bar to* tobacco related personal injury, wrongful death, or other tort *claims* against tobacco manufacturers and their successors in interest *by California smokers* or others who *have suffered or incurred injuries,* damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to *clarify* that those *claims that were or are brought shall be determined on their merits, without* the imposition of *any* claim *of statutory bar or categorical defense."* (Italics added.)

Three portions of this declaration expressly prescribe a retroactive effect. The first extends the abolition of the prior immunity to persons who *"have* suffered or incurred" damages from tobacco products. A statute" 'speaks from the date ft takes effect.' " *(Hersh v. State Bar* (1972) 7 Cal.3d 241,245, quoting *People v. Righthouse* (1937) 10 Cal.2d 86; see *Right ho use, supra,* at p.88 ["every statute speaks as though the Legislature was in session on the day when the act takes effect and passed ft on that day'].) The statute thus must be understood as a statement by the Legislature, speaking on January 1, 1998, that persons who "ha[d] suffered" damages from tobacco products, as of that date, were not to be impeded in the assertion of claims by the

immunity formerly afforded to tobacco manufacturers. As a matter of common sense, the words chosen could hardly mean anything else, and as a matter of grammar, they do not The quoted phrase uses what is usually referred to as the "present perfect" tense. It refers to an event beginning in the past and either completed in the past or continuing into the present The event here described the suffering of an injury necessarily contemplates antecedent injury-producing *conduct* by the defendant The quoted phrase thus constitutes an explicit extension of the repeal to at least some injuries and conduct preceding its enactment

The statute next declares an intent that "those *claims* that *were* or are *brought* shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." This wording, using the simple past tense, is unusual, but that does not deprive ft of effect. The statute speaks as of its effective date, and a reference on January 1, 1998, to claims that "were brought" can only mean *claims brought prior to that date.* We conceive no interpretation of this language, and defendant suggests none, which gives ft any other meaning. It thus reiterates and reinforces the legislative intention to extend the repeal of immunity to at least some past claims not only claims based on past events and conduct, but also claims "brought" before the effective date.

Further textual evidence of retroactive intent appears in the statement that the Legislature intends to *"clarify"* that the described claims will be decided on their merits without regard to the former statutory bar. Here "clarify" is a term of art presumably intended to invoke the rule that "a statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" (*Western Security Bank v. Superior Court, supra,* 15 Cal.4th 232 at p. 243, italics omitted.) Of course a flat repeal of a prior statute is *not* in fact a mere "clarification"; by definition it changes the law. The Legislature's characterization of such a change as a "clarification" is not binding on us. (*Id.* at p.

244.) Nonetheless ft is textual *evidence* that "may still effectively reflect the Legislature's purpose to achieve a retrospective change." *(Thid.)*

Relying on *CoWeld v. American Tobacco Company* (E.D.Cal. Aug. 6, 1999, Civ-S-98-1695 DFL DAD) an unpublished memorandum of opinion from a federal trial court defendant makes a series of arguments against reading subdivision (9 as

expressly disclosing retroactive intentFN5 Defendant notes that the statute lacks a retroactivity clause as explicit as those found in other statutes. The short answer to this is that California law does not require the most explicit possible clause. The question is whether the Legislature has disclosed by" 'express language or clear and unavoidable implication' "an intent to apply the statute to prior events. (*Evangelatos v. Superior*

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Court (1988)~ Cal.3d 1188, 1208.) We have answered that question in the affirmative. That the Legislature could have made its intentions clearer does not mean ft failed to make them clear enough.

Quoting the unpublished *Co Weld* decision, defendant asserts that subdivision (IF)" 'seems to take a later perspective in time, after January 1,1998, when ft could accurately be said that "there exists no statutory bar.., to tobacco-related tort claims."' "(Ellipsis defendant's.) To the same effect is the suggestion that subdivision (1) might be" 'read from the perspective of future courts, to whom the Legislature is providing interpretive advice."' These statements are devoid of logical force because they are couched in terms of mere apparency or possibility, as if ft were unnecessary to say what the statute actually means. insofar as they assert anything, ft is that the verbs in subdivision (IF) speak from some future time. We discern no basis for this hypothesis, which flatly contradicts the

principle that a statute speaks as of the time of its enactment (*Hersh 's'. State Bar, supra,* 7 Cal.3d at p. 245.) The quoted rumination to the contrary seems to reflect nothing more than an unwillingness to give the Legislature's words their apparent meaning.

We are likewise unpersuaded by the statement that" '[a]n unexplained shift in verb tense is too slender a reed on which to base such a significant departure from normal legislative practice.' "In addition to the reasons already stated, to disregard statutory language as insignificant violates the canon that "whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*Agnew v. State Ed. of Equalization* (1999)21 Cal.4th 310, 330.) We are not free to adopt an argument that simply dismisses statutory language as "unexplained" or "too slender."

Somewhat more plausibly, defendant contends that an intent to apply the 1998 legislative changes top~ conduct injuries, or claims, is incompatible with that portion of subdivision (e) of section 1714.45 (subdivision (e)) stating that in any recoupment action brought by a public entity, "the fact that *the injured individual 's claim against the defendant may be barred by a prior version of this section* shall not be a defense." (Italics added.) According to defendant the italicized language is an explicit acknowledgement that as of the effective date of the statute, and thereafter, prior versions of the statute could continue to bar claims. Defendant also suggests that the quoted language would be superfluous if the 1998 amendments effected a complete retroactive repeal of the prior immunity.

Defendant thus obliquely invokes two rules of construction. The first which we have already noted, counsels against a construction that will render parts of a statute

superfluous. (*Agnew v. State Bd of Equalization, supra,* 21 Cal.4th at p. 330.) Defendant seems to imply that if the Legislature intended to retroactively lift the former immunity as ft affected individual claims, ft would not bother to prescribe a rule for cases in which individual claims might be subject to the immunity. Second, defendant may be

understood to suggest that for similar reasons, subdivision (e) actually *conflicts* with subdivision (f) insofar as the latter is construed to make the repeal retroactive; implicit in this suggestion is the further proposition that the conflict should be resolved in favor of subdivision (e).

The indirectness of this argument may stem from the difficulty of asserting ft more cogently without exposing its fatal weakness. In a sentence, the cited language from subdivision (e) does no more than acknowledge the *possibility* that *some* claims "may" be "bred by a prior version of this section." There is no logical conflict between such a statement and an expression of legislative *intent* that claims *not* be barred. Even if the two provisions appeared to be in tension with each other, such tension would not provide a sufficient basis to simply ignore one of them. "It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit" (*Wells v. Marina City Properties, Inc.* (1981)29 Cal.3d 781, 788; *People v.*

Garcia (1999)21 Cal.4th 1,6.) Thus if a statute contains two potentially conflicting terms, a court will attempt to avoid an interpretation that requires ft to disregard one of them "or to rewrite some of their provisions." (*People v. Garcia, supra,* 21 Cal.4th at p. 6.) Such a neutralizing construction, or "reformation," may be undertaken if "compelled by necessity and supported by firm evidence of the drafters' true intent" (*Thid.)* It should be avoided, however, "when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or

altering any of them." *(Thid.)*

Here the cited provision of subdivision (e) is readily harmonized with the retroactive repeal of the statutory immunity, at least as applicable to this case. It can be read as a reflection of legislative uncertainty about the future judicial treatment of the repeal. In *Landgraf supra,* 511 U.S. at p. 261, the court rejected an argument that language specifying the prospective effect of some parts of a statute would be superfluous if other parts were not applied. retroactively. The court said that the specification of prospectivity was explained by, among other things, "Congressional doubt concerning judicial retroactivity doctrine." (

• *Ibid.)* Here, the Legislature was not

required to gamble that courts would retroactively apply the repeal of tobacco immunity to any and all individual claims. The Legislature was entitled to anticipate that courts might hold some claims barred, and to act on that possibility by declaring that ft had no effect on

recoupment claims by public entities..

Defendant makes no attempt to harmonize or reconcile subdivisions (e) and (f) but would simply rewrite the latter to remove any reference top~ claims. But defendant makes no attempt to show, and we see no basis to conclude, that such a treatment is "compelled by necessity" or "supported by firm evidence of the drafters' true intent" *(People v. Garcia, supra,* 21 Cal.4th at p. 6.) As we have explained, the supposedly conflicting provisions can be reconciled by positing legislative uncertainty over the extent to which courts would carry out the expressed intent that the statute apply to events and claims predating its effective date. The provisions of subdivision (e) therefore afford no occasion to disregard those expressions of intent

We conclude that the 1998 amendments to section *1714.45* manifest on their face a legislative intent that the repeal of the immunity originally conferred on tobacco companies be effective with respect to claims involving events antecedent to the effective date of the amendments. This is not to say, and we do not decide, whether the repeal extends to *all* claims asserting antecedent events. It is enough for our purposes that the Legislature expressed an intent to extend the repeal to *some* class of antecedent claims. As will appear, if the statute applied to *any* such claims, ft necessarily applies to plaintiffs claims. (See section E, below.)

- 2. Extrinsic Evidence of Legislative Intent

Defendant contends that notwithstanding the text of subdivision (f), the legislative history of the 1998 repeal establishes that ft was not intended to apply retroactively. This argument depends not on the history of the statute as ft ultimately became effective but on the failure, by veto, of another measure introduced in that same session to abolish tobacco manufacturers' immunity under section *1714.45*. The gist of defendant's argument appears to be that the other measure, Senate Bill No. 340 (1997-1998 Reg.

Sess.) (SB 340), explicitly provided for retroactive effect; thus, defendant implies, the failure of that measure is a repudiation of such effect

We find this contention unsound in a number of respects. First although a court seeking to ascertain the proper application of a statute "may properly rely upon extrinsic aids, ft should first look to the words of the statute to determine the Legislature's intent" *(O'Kane*

v. Irvine (1996)47 Cal.App.4th 207,211; see *Krazw v. Trinity Management Services, Inc.*

(2000)23 Cal.4th 116, 129 ~ the. language of a statute is clear and unambiguous, judicial construction is not

necessary and a court should not indulge in it']; *IA. Jones Construction Co. v. Superior Court* (1994)27 Cal.App.4th 1568, 1578 [noting dangers inherent in "reading the tea leaves of legislative history"].) Here we see no need to resort to legislative history, or other extrinsic evidence, given the explicit references to past events and claims in subdivision (f).

Second, evidence of unenacted legislation has been repeatedly rejected as a basis for establishing the intent of enacted legislation. (E.g., *People v. Escobar* (1992) 3 Cal.4th 740, 751 r" 'weak reed upon which to lean' "]; *Snyder v. Michael 's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 Ilsamel; *Id.* at p. 1003, fn. 4 [vetoed statute overturning prior decision "provide[d] no guidance"]; *California Labor Federation v. Industrial Welfare Corn.* (1998) 63 Cal.App.4th 982, 994 [disregarding vetoed bill overturning regulatory action]; *Baldwin*

v. County of Teharna (1994) 31 Cal.App.4th 166, 181, fn. 10 ["legislative history tea leaves"].)

Third, such light as SB 340 might shed on the legislative intent of SB 67 is unfavorable to defendant's position. SB 340 would have added a new section *1714.55* to the Civil Code dealing exclusively with the application of section *1714.45* to claims asserting specified theories of liability against tobacco manufacturers, their successors, and tobacco industry research organizations. (SB 340 as enrolled Sept. 3, 1997; http://wx ~w.1e info,cacrov/pub/ 97-98/ ill/sen/sb 0301-0350/st 40 bill 19970903 enroll d.htmh) The new statute would have: (1) declared section 1714.45 inapplicable to any action against one of the specified defendants by a person who did not voluntarily consume tobacco; (2) declared section 1714.45 inapplicable to any action against one of

the named defendants sounding in fraud, misrepresentation, or conspiracy; (3) declared the legislative "intent" that section 1714.45 "never applied" to

such actions; and (4) declared that *American Tobacco, supra,* 208 Cal.App.3d 480, "misinterpreted the intent of the Legislature" to a stated extent such that the new statute would not change, but would be declaratory of, existing law. (SB 340, § 1.) The bill also contained a further uncodified expression of legislative intent of little apparent relevance. *(Id.,* § 2.)

The governor's veto message, to which defendant does not allude, states that his refusal to sign the bill rests not on any desire to limit the abolition of the former immunity but on the belief that the bill was redundant of SB 67 and thus threatened to generate needless confusion. The governor wrote that he was refusing to sign the bill because it "creat[ed] exceptions to an immunity which no longer exists." (Governor's Veto Message to Sen. on Sen. Bill No. 340 (Oct. 3, 1997) (1997-1998 Reg. Sess.).) It was in that light that he believed its enactment "would.., serve no purpose," and that it would, if it became law, "create confusion over the meaning of the statute as it is now amended." *(Ibid.)* Thus the Governor's opinion that the proposed statute was redundant of SB 67, far from supporting defendant's argument, suggests that the Governor expected SB 67 to have a similar effect i.e., to apply to all claims Within its scope regardless of when they arose or when the events on which they rested occurred.

Finally, while defendant fails conspicuously to discuss the legislative evolution of SB 67 itself and while the legislative record lacks a "smoking gun" on the subject of

• retroactivity, we find substantial support in it for the premise that subdivision (1) was intended, and indeed its primary purpose was, to extend the abolition of the former immunity to at least some past events and claims. As originally proposed the bill contained no such provision. The first committee analysis on the bill contained the following comments under the heading "Prospective repeal only": "Some concern has been expressed that SB 67

would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying retroactive application, a measure Will operate prospectively only upon its enactment." (Sen. Coin. on Judiciary, Analysis of Sen. Bill No.67(1997-

1998 Reg. Sess.) as amended Feb. 14, 1997, for hearing date of Apr. 8, 1997.) One week after this acknowledgment of "concern" about a prospective-only application of the amendments as then drawn, the bill was amended by the insertion of what is now subdivision (9. (SB 67, *supra*, as amended Apr. 16, 1997.)

The record also contains evidence that (1) the broad "immunity" found in *American Tobacco* came as a surprise; and (2) the original statute had been enacted under a mistaken understanding induced at least in part by the tobacco industry's own deceptions. In a Senate floor analysis, a supporter of SB 67 is quoted as follows: " 'At the time [of enacting former section 1714.45], it was not anticipated that the California courts would interpret [it] so broadly. Over the last decade, we have also learned much regarding the addictive nature of tobacco and the industry's intentional efforts to mislead the public on the health effects of tobacco. This, coupled With the courts' broad interpretation of the California statute, has precipitated the need to change that statute and remove tobacco's liability protections.' "(Sen. Rules Coin., Floor Analysis, Sen. Bill No. 67(1997-1998 Reg. Sess.) as amended Aug. 11, 1997.)

We conclude that the legislative history does nothing to detract from, and if anything enhances, our conclusion that the express references top~ events and claims in subdivision (1) must be applied to extend abolition of the statutory immunity to at least some events and claims antedating January 1, 1998.

Defendant asserts that application of the 1998 amendments *so* as to deny it the immunity provided by the previous version of the statute will violate the constitutional guarantee of due process of law and the prohibition against ex post facto laws. This, at any rate, is the assertion in defendant's argumentative heading. However, .the ensuing text argues, not that such an application of the amendments is constitutionally prohibited, but that the statute must be *construed* not to permit such an application, under the" 'cardinal principle' that statutes must be construed, whenever possible, to avoid raising constitutional issues."

(Quoting *United States "'. Security Industrial Bank* (1982) *459*

U.s. 70, 78.)

First, defendant suggests that the Legislature cannot retroactively abolish a preexisting defense without violating the due process rights of a party who would otherwise have been entitled to raise that defense. The primary cited authority for this supposed rule is *Morris v. Pac(f Ic Electric Ry Co. (1935)* 2 Cal.2d 764, 768-769. Although the analysis in that case is somewhat oblique, the real holding appears to be that a legislative change in the principles governing the doctrine of "negligence per se" was a substantive change in law which could not be accomplished without a clear indication of legislative intent Defendant quotes, in heavily edited form, the following comment: "[Tihe legislature may not, *under pretense of regulating procedure or rules of evidence,* deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore." (*Id.* at p. 768, italics added.) More critical to our analysis is a statement defendant ignores altogether: *"The legislature did not assume to make the amendment retrospective* and under the circumstances *the court is not warranted in doing so."* (*Id.* at p. 769, italics added.)

Defendant cites *In re Marriage of Garcia* (1998)67 Cal.App.4th 693, 698-699, where we cited *Morris* in holding that a statute silent as to its own application top~ events could not, by the expedient of calling ft "procedural," deprive a party of substantive defenses to which he had long since become entitled by passage of time. We did not purport to hold that retroactive application, if called for by the Legislature, would have been unconstitutional. Similarly, *Zellers v. State of California (1955)* 134 Cal.App.2d 270, was concerned with the effects of an enactment that did not purport by its terms to apply to pre-enactment matters.

Defendant also quotes the statement in *Beck Development Co. v. Southern Pacific*

Transportation Co. (1996)44 Cal.App.4th 1160, 1207, that "[i]n general, legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and completed before its enactment." Application of this proposition is conditioned on (1) categorization of the case in which ft is asserted as falling within the "general" rule, and (2) characterization of the conduct at issue as having been "completed" when the statute took effect. Moreover, this generalization is expressly conceded by the court to rest largely or entirely not on any constitutional prohibition against a contrary result but on the "constructional policy against the retroactive application of legislation." *(Ibid.)* As we have seen, that policy which is a presumption or preference and not, as defendant suggests, a prohibition is overcome here by the express language of the statute. The court's general reference to "constitutional prohibitions" is no more effective than defendant's to establish that this case falls within such a prohibition.

In sum, none of the cases cited by defendant or known to us actually rests on the proposition that the Legislature lacks the *power* to retroactively abolish .a defense ft has previously created. Indeed we see little basis for such an

argument. Even if the defense had become a vested right a dubious proposition such rights"' "may be impaired 'with due process of law' under many circumstances."' "(*In re Marriage o fEouquet* (1976)16 Cal.3d 583, 592.) The dispositive question appears to be"' "whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment"' "(*Thid.*) The Legislature might well conclude that ft was, particularly in light of evidence, alluded to in the legislative record (see above), of concerted efforts by the tobacco industry to deceive smokers, the public, and legislators themselves concerning the dangerous effects of their products.

We also note that any claim of unfairness in the abolition of a statutory defense must take account of Government Code section 9606, which provides, "Any statute may be repealed at any time, except when vested rights would be impaired. *Persons acting under any statute act in contemplation of this power of repeat"* (Italics added.) On its face this provision sharply limits any claim by a defendant that its wrongful conduct is shielded by having been undertaken in reliance on the assurance provided by a statutory defense. Defendant contends in essence that ft was entitled to market dangerous products and misrepresent their dangerousness because ft had been promised that ft could do so without fear of liability. The promise, however, was subordinated to an express legislative reservation of a power of revocation. Upon learning of the true nature of defendant's conduct, the Legislature exercised that power. We see no reason to suppose

that defendant was any more entitled to rely on the statute as protection against inchoate

claims, i.e., claims not yet presented and adjudicated, than a plaintiff would be to rely upon the continued future existence of a statutory cause of action not yet reduced to judgment

We conclude that defendant has demonstrated no sufficient basis on which to hold that

application of the 1998 amendments here would offend the due process clause.

Defendant also makes passing suggestions that application of the 1998 repeal to this case would constitute an ex post facto law in violation of the federal and state constitutions. This argument can have no bearing on an award of *compensatory* damages; the ex post facto clauses" 'apply only to penal statutes.' [Citation.]" *(Greenbaum* i'. *State Bar* (1987) 43 Cal.3d *543, 550.)* Defendant may be understood to suggest that the award of *punitive* damages was "penal" for purposes of the constitutional prohibition, and thus that the 1998 repeal cannot authorize recovery of those damages based on conduct prior to its effective date.

Assuming a punitive damages award might be deemed "penal" for purposes of the prohibition against ex post facto laws, the prohibition only applies if the challenged law "makes that criminal or penal which was not so *at the time the action was pe~~ed... .*" *(Thompson* 't'. *Missouri* (1898) 171 U.S. 380, 383; *United Business Coin.* 'i'. *City of San Diego* (1979)91 Cal.App.3d 156, 172-173, fn. 7.) (Italics added.) The statutory immunity asserted by defendant only existed from January 1, 1988, to January 1, 1998. Accepting for the moment the premise that penalizing conduct *during that period* would offend the ex post facto clause, the same cannot be said for conduct *before 1988.* That conduct, if subject to penalty when ft occurred, would remain subject to penalty today at least, the ex post facto clause is no impediment The intervening period of immunity might be relevant to some issues, but would have no relevance to the ex post facto analysis.

It is at least arguable that defendant's most culpable conduct *as to this plaintiff took* place during the 1960s, while plaintiff was being induced as a teenager to become thoroughly addicted to cigarettes. The jury may well have imposed punitive damages

entirely on the basis of that conduct, or on other conduct prior to 1988. We are directed to no evidence that defendant requested an instruction informing the jury that ft could not award punitive damages based on conduct during the time the immunity was in effect (the immunity window). Indeed we are directed to no evidence that defendant ever sought to separate the ex post facto issue, as ft arose under section 1714.45, from the claim of a total defense based on that statute. Since the ex post facto argument could at most warrant relief affecting punitive damages, and in that regard only to limit the evidence that the jury could consider, ft was not adequately presented by a motion for nonsuit, and is not properly before us.

E. Application to Present Case.

We have concluded that the 1998 amendments to section 1714.45, and particularly the addition of subdivision (f) to that section, represent a clear expression of legislative intent that such immunity as existed under the original statute be repealed or abolished with respect to at least some past events and claims against tobacco companies. We need not decide whether some claims remain barred, or where the line lies between those that may be barred and those that may proceed. Subdivision (f) explicitly contemplates that some cases may proceed even though they were "brought" before the amendments took effect. This case was "brought" *after* the amendments took effect, and so far as has been shown on appeal, after the "accrual" of plaintiffs cause of action for limitations purposes. If subdivision (f) does not require the adjudication of *this* case "on [its] merits, without the imposition of' the former "statutory bar or categorical defense," then we fail to see

how that subdivision can serve any purpose whatsoever.FN6

We conclude that section 1714.45 was not a defense to this action.

II. FEDERAL PREEMPTION.

Defendant contends that many or all of the legal grounds on which the jury was permitted to impose liability were preempted by the 1969 Act. The only specific errors suggested are that (1) the court erroneously permitted the jury to consider evidence made inadmissible by the 1969 Act, and (2) the trial court gave an instruction overstating the

extent to which the jury could find liability consistent with federal law.FN7

The suggestion of evidentiary error is too vague for appellate consideration. No particular ground of exclusion is offered. We may *infer* that defendant relies on the premise that preemption rendered certain evidence irrelevant, but we will not address errors at the very nature of which we are forced to guess. Furthermore defendant makes no attempt to establish that any pertinent objection has been preserved for appeal by timely interjection in the trial court. (See Evid. Code, § 353.) We therefore pass this claim without further consideration.

Defendant waived much of its instructional objection by *express consent and invitation*. Defendant stipulated in open court that all instructions actually read to the jury were given at the "request and the invitation" of both parties except insofar as objections were embodied or expressed (1) in certain dispositive motions denied just before the stipulation was entered; (2) by express statement immediately *after* entry of the stipulation; or (3) immediately after the reading of instructions, insofar as any party might assert that the instructions as read did not

conform to those called for by the stipulation.

Defendant does not claim to have asserted federal preemption as a ground for any of the motions to which the stipulation referred, and appears not to have done so.

reason since preemption by the 1969 Act furnishes no defense to claims arising before its effective date. As for express objections voiced *after* the stipulation was entered, defendant lodged exactly one: namely, that the instructions were erroneous insofar as they allowed a verdict for plaintiff based on a theory of *conspiracy to conceal* after July 1, 1969. Counsel stated that defendant's "only objection" was that the instructions failed "to *incorporate the July], 1969 limitation* as it relates to the *conspiracy to conceal* claim." (Italics added.)

No party will be heard to complain of an error it invited. (*Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121 Va party cannot successfully take advantage of error committed by the court at his request."]; see *Lynch v. Birdwell (1955)* 44 Cal.2d 839, 847.) Defendant is not relieved of this rule by Code of Civil Procedure section 647, which states that jury instructions are among judicial actions "deemed excepted to" without an express exception. (Code Civ. Proc., § 647.) The statute only means that "an appellant is deemed to have excepted to the instructions *he has not requested or agreed to.*" (*Pugh v. See 's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759, italics added; see *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, *1653-1654, 1655; id.* at p. 1653, quoting *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["The invited error doctrine applies 'with particular force in the area of jury instructions.' "1.)

By the express terms of the stipulation, defendant "request[ed] and invit[ed]" the instruction complained of except insofar as it allowed recovery for *conspiracy to conceal* after 1969. Defendant cannot enlarge this objection on appeal so as to argue that the jury was improperly

permitted to consider other theories in connection with post-1969 events and conduct.

With the issue thus narrowed, we find it unnecessary to decide whether the instruction accurately states the scope of federal preemption because it is impossible to say that the verdict was probably affected by any cognizable error. "To prevail on a claim of instructional error, the appellant must show a reasonable probability of a more favorable result in the absence of the error." *(Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) In considering whether it"' "seems probable" that the error "prejudicially affected the verdict," ' " a reviewing court "should consider not only the nature of the error. . ., but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' "*(Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 983, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.) The burden is on the complaining party to "demonstrate [that] a miscarriage of justice arose from the erroneous instruction." *(Rutherford, supra,* 16 Cal.4th at p. 983.)

Defendant's showing here falls far short of demonstrating that an instruction barring liability for conspiracy to conceal after 1969 would probably have affected the outcome. The jury found for plaintiff on *all eight* legal theories embodied in the instructions, i.e., (1) supplying a product tat failed to perform as safely as an ordinary consumer would expect it to perform; (2) supplying a produot before 1969 while failing to give adequate warning of its dangerousness; (3) simple negligence; (4) breach of express warranty; *(5)* intentional misrepresentation; (6) fraudulent concealment; (7) fraudulent promise; and (8) negligent misrepresentation. The jury also found that defendant committed conspiracy to defraud by concealment, suppression, or misrepresentation of the health effects of cigarette

smoking. Only one of these findings (conspiracy to commit fraudulent concealment) is affected by the alleged error before us, and it is only partially affected; a holding in defendant's favor would only mean the jury could not find for plaintiff on that theory on the basis of post1969 conduct. On the face of the special verdict alone, it appears unlikely that such a limitation would have had any effect on the ultimate finding of liability.

Defendant argues that the court's error with respect to preemption was prejudicial in that it caused the court to "improperly allow into evidence a mass of documents and testimony" concerning post-1969 advertising, failures to warn, and concealment of health risks. This is not a showing of "prejudice," but a back-door attempt to charge evidentiary error without laying the necessary foundation. (See Evid. Code, § 353.) Defendant makes no coherent showing that this evidence was not admissible for a proper purpose unrelated to concealment, e.g., to establish scienter in support of a claim for fraud. Fraud is outside the preemptive scope of the 1969 Act (*Cz~oione* i'. *Liggett Group, Inc.* (1992) 505 U.S. 504, 528 *(Cipoione).)*

Defendant's next claim of prejudice is that in argument to the jury, plaintiff's counsel relied heavily on the supposedly preempted theory embodied in the challenged instruction. The passages cited by defendant, however, concern not conspiracy to conceal after 1969, but inadequate package warnings *before* 1969. In her first allusion to package warnings counsel said, *"/171/zen Patricia started smoking* at age 15 in 1961, there was nothing on the package. There was no warning;" (Jtalics added.) Counsel went on to argue that given the health risks posed by cigarettes, "you'd expect to see a skull and crossbones on ft (indicating). You'd expect to see the word 'Poison' on ft." Counsel next alluded to package warnings in connection with the first warning mandated in 1965, which counsel denounced as inadequate to deter plaintiff, by this time "a regular smoker [who] needed her cigarettes." Federal law posed no impediment to this argument, and

defendant does not suggest otherwise. *(Cz~oione, supra, 505* U.S at pp. 5 19-520.)

The specific passage cited by defendant echoed the earliest one in its reference to a skull and crossbones, and also followed, if at slightly greater distance, explicit references to plaintiff's original acquisition of the smoking habit Thus counsel conceded plaintiff's inability to specify a date and advertisement that caused her to begin smoking Marlboros. instead, counsel said, plaintiff had started smoking Marlboros because of a" 'cute guy at school' "who" 'looked like the Marlboro Man.' "Counsel then discussed defendant's use of the "Marlboro Man" as a symbol of independence particularly appealing to teenagers. To support this argument counsel read aloud from, apparently, a 1976 Philip Morris memorandum quoting a 1969 source which itself was apparently derived from an earlier source. Counsel argued that defendant exploited the symbolism of the Marlboro Man in order to induce teenagers to start smoking its products: "You don't become the No. 1 cigarette brand because you don't appeal to teenagers. That's the only way that you *get starters. Starters equal children.* And children do not make informed choices. [∂1 And had that [apparently indicating image of skull and crossbones] appeared on the pack, there's a greatly *[sic]* likelihood that somebody would see that, instead of a red and white color package that looks source.... That's the kind of warning that would be paid attention to.

Given this context we find ft disingenuous of defendant, at best, to characterize these remarks as having been made "without any distinction as to time." Indeed plaintiff's counsel told the jury, if somewhat elliptically, that ft could not predicate liability on a failure to warn after 1969. She went on to argue that the jury should find for plaintiff on a consumer expectations theory because the years preceding 1969 were "the time frame when [plaintiff] was... becoming hooked." Nothing in counsel's argument provides any basis to think that the jury relied on a theory of post-1969

conspiracy to conceal, or that had ft expressly forbidden to do so ft would have found for defendant on any other theory let alone all of them.

me STRICT PRODUCTS LIABILITY.

A. Post-1969 Defect Under "Consumer Expectations Theory"

Defendant contends that, for a variety of reasons, plaintiff was not entitled to judgment on her theory of strict tort liability for manufacture of a defective product. The jury was instructed by stipulation that this claim was established if, as pertinent to this appeal, plaintiff was injured as the result of a design defect in a product manufactured by defendant A product is defective, the jury was told, if(1) ft "fails to perform as safely as

an ordinary consumer would expect when used in an intended or reasonably foreseeable manner"; or (2) its use in a foreseeable manner involves a substantial danger not readily

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Henleyv. Philip Morris Verdict Affirmed by Court of Appeinls 11i7101

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recognized by the ordinary user, the danger was known or knowable at the time of manufacture in light of generally recognized and prevailing scientific and medical knowledge, and the manufacturer "failed to give an adequate warning of that danger before July 1, 1969."

Defendant asserts that the trial court erred by permitting plaintiff's consumer expectations" claim to go to the jury without restricting ft to the time before the effective date of the 1969 Act We have serious reservations about the soundness of this argument, which sounds in federal

preemption, but we need not decide the issue because the point is barred by the parties' stipulation. (See section II, above.) Defendant argues that ft preserved the point by objecting to the portion of the instructions permitting the jury to find conspiracy to conceal after 1969. We fail to see how. Under the stipulated portions of the instructions the jury was free to return a verdict for plaintiff if ft found that the cigarettes smoked by her were *at any time* more dangerous than the ordinary consumer of cigarettes would expect. The jury Obviously made such a finding, which was supported by overwhelming evidence.

B. Failure to Heed Warnings.

Defendant asserts two related arguments to the effect that the presence of package warnings barred recovery on a products liability theory as a matter of law.

First, defendant contends that a product labeled with mandatory warnings "cannot" be found to "fail California's consumer expectations test." Insofar as this argument hints at federal preemption ft is not cognizable on appeal for the reasons already stated. We address ft solely as a proposition of California tort law. We find no persuasive basis for ft in the cases cited by defendant

In *Papike ". Tambrands Inc.* (9th Cir. 1997) 107 F.3d 737, cert. denied, the court affirmed a summary judgment for a tampon manufacturer on a claim that its product caused the plaintiff to suffer toxic shock syndrome. Defendant cites the case for its

disposition of the plaintiff's consumer expectations claim in two terse sentences:

"Tambrands' warnings met the federal requirements and Papike's design defect claim therefore fails the 'consumer expectation' test. To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its

government-mandated warnings indicate." (*Id.* at p. 743.) We are unpersuaded that these comments conform to California law, at least if taken outside the facts of that case. The warnings there might well have justified summary judgment for the defendant, because they explicitly notified the user of the very danger at issue and there is no suggestion of any countervailing evidence raising a genuine material issue of fact as to the likely expectations of consumers. The court's unilluminated statement that liability would be "anomalous" does not furnish a sufficient ground to take the matter from the jury.

In *Macias f". State of California (1995)* 10 Cal.4th 844, the court held that insecticide makers had no duty to issue warnings to the public in connection with an emergency insect eradication program, where the state had already issued warnings required by applicable statutes. (*Id.* at p. 857.) The holding did not rest on some presumption that the mandatory warnings were adequate as a matter of law, but on the injudiciousness of requiring private parti s to "interfere with" the state's emergency efforts. (*Ibi .*)

In *Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1094, the court affirmed a

• summary judgment on the ground that the warning given there was sufficient as a matter of law, as shown by the evidence. Nothing in that decision suggests that a government-mandated warning categorically bars liability for a product otherwise shown to be more dangerous than ordinary consumers expect. Other cases cited by defendant do not purport to apply California law, and are not persuasive on the point at issue. (See *Haddix v. Playtex Family Products Corp.* (7th Cir. 1998) 138 F.3d 681, 686 [tampons came within Illinois rule for "simple products," and were not unreasonably dangerous given specificity of warnings and plaintiff's admission that she read them]; *Lescs v. Dow Chemical Co.* (W.D. Va. 1997)976 F. Supp. 393, 399 [federal labeling act *preempted*

claim under Virginia law that insecticide was defective under consumer expectations theory].)

Defendant's second argument concerning package warnings is that plaintiff's supposed failure to heed warnings precludes, as a matter of law, a finding that any defect in the product was a proximate cause of her injuries. This argument seems to proceed as follows:

(1) Where a product bears government-mandated warnings, they must be presumed sufficient to apprise the user of the steps necessary to avoid injury; (2) where a plaintiff fails to take such steps, his or her conduct is a superseding cause of any injury she suffers; (3) had plaintiff quit smoking in compliance with package warnings, "she almost certainly would not have developed lung cancer from smoking"; therefore (4) any defect in defendant's product was not a proximate cause of plaintiff's injuries.

In support of the first point defendant cites four cases for a proposition they do not remotely support, i.e., that "[u]nder California law, a plaintiff's failure to heed a product warning negates any potential liability because, under such circumstances, the plaintiff's own conduct, not a product defect, is the proximate cause of the plaintiff's injury." In *Schwoerer v. Union Oil Co.* (1993) 14 Cal.App.4th 103, 110-111, the court reversed a

summary judgment for a defendant based on its claim that its product warnings were adequate as a matter of law; the court assumed the proposition, conceded by the plaintiff, that "where *adequate* warnings have been passed along from manufacturer or seller to the ultimate consumer, there can be no liability." (Italics in original.). It cited *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174, 178, where a jury verdict for a ski binding maker was affirmed over the plaintiffs argument that the defendant breached a *duty to warn* as a matter of

law; the court held that the defendant's duty was discharged by giving appropriate warnings to the ski shop that installed the bindings. Similarly, in *Carmichael ~ Rein* (1971) 17 Cal.App:3d 958, 989, 991, the court affirmed a jury verdict for a drug manufacturer despite a failure to warn the plaintiff where adequate warnings were given to her physician.

Defendant apparently cites *Cakes f". E. I Du Pont de Nemours & Co, Inc.* (1969) 272 Cal.App.2d 645, 649, for its general discussion of failure to warn as a species of product defect Aside from the inaptness of this discussion to the question of proximate cause, portions of the decision contradict defendant's position. Most notably, the court said that a product bearing an adequate warning," *' which is safe for use ~f it is followed,* is not in defective condition, nor is ft unreasonably dangerous.' "(*Ibid.*, quoting Rest.2d Torts, §402A, com. *j*, italics added.) Defendant points to only one warning here that ever gave any instruction to be "followed" a statement that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health." This warning was not adopted until October 12,1984, and was not required to appear until one year after enactment (Pub.L. No. 98474 (Oct. 12, 1984)98 Stat 2202.) Plaintiff had then been smoking for some 23 years. We are directed to no evidence concerning the medical probability that quitting in 1985 would have affected the course of her illness. In any event *Cakes* does not support the point for which ft is cited.

Likewise *Luque ri'. McLean* (1972) 8 Cal.3d 136, 145, is concerned not with proximate cause but with the kind of *contributory negligence* that will constitute a defense to a product liability claim." 'For such a defense to arise,' "the court wrote," 'the user or consumer must *become aware* of the defect and danger and *still proceed unreasonably* to make use of the product' "(*Ibid.*, italics added; see *idi* at p. 145, fn. 9 [discussing Rest.2d Torts, § 402A, com. *n*, and other authorities on" 'assumption of risk' "in strict liability cases].) Defendant apparently waived any such defenses;

the stipulated instructions included none on these subjects. The *Luque* decision therefore has no bearing on this appeal.

C. Reliance on Expert Testimony

Defendant also contends that the jury's finding of liability on a consumer expectation theory rests impermissibly on expert testimony. This argument depends upon a misconstruction of *Soule v. General Motors Corp. supra,* 8 Cal.4th 548 at p. 567, 4 concerning the general impropriety of relying on expert witnesses to establish the expectations of the ordinary consumer. The actual holding is that" *where the minimum* 4 *safety of a product is within the common knowledge of lay jurors,* expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." *(Ibid.,* italics added.) In a footnote, the court confirmed, in the context of "specialized" products, the implied corollary of the above rule: "[I]f the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper." *(Id.* at pp. 568-569, fa. 4.) This rationale would seem to authorize the admission of expert testimony at least for the purpose of establishing what *smokers* expected at various times *in the pas4* most particularly during the critical period when plaintiff began to smoke and became "hooked."FNS Defendant extracts from *Soule* the proposition that "[b]y using experts, plaintiff disqualified herself as a matter of law. from relying on a tconsumer expectations' theory..

." In other words, by merely proffering expert testimony, plaintiff waived her consumer expectations theory. The proposition is absurd if only because expert witnesses may well be called on issues having nothing to do with consumer expectations. *(Soule, supra,* 8

Cal.4th at p. 567.) Furthermore, the argument again rests on supposed evidentiary and 4

instructional errors that are not separately stated or coherently demonstrated on appeal and 3 are not shown to have been raised below. If defendant's argument was sound, the remedy was to exclude the expert testimony or withhold the consumer expectations theory from the jury not to suffer admission of the testimony, stipulate to the jury's consideration of the theory, and then seek reversal on appeal.

D. Inherently Dangerous Product: Comment i and BAJI No. 9.00.6.

Defendant next asserts that plaintiff's product liability claims were barred by the doctrine stated in comment *i* to section 402A of the Restatement Second of Torts (comment () and

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Bail No. 9.00.6. Two distinct errors seem to be asserted. One is that the claims were barred as a matter of law and thus, by implication, should not have been submitted to the jury at all. The other is that the court committed "instructional error" by refining a supposed request to give Bail No. 9.00.6.

The claim of instructional error has been waived. Defendant asserts in its reply brief that ft requested the instruction in connection with all of plaintiff's product liability theories. No such request is cited. Instead, at the cited point in the transcript, *both counsel agreed* with the court's statement "that the defense did request that the court give 9.006 *[sic] on the risk/benefit prong* of Barker versus Lull." This was an allusion to a specific theory of product liability asserted by plaintiff. (See *Barker ". Lull Engineering Co.* (1978)20 Cal.3d 413.) In response to that

limitation, plaintiff expressly abandoned the *Barker* theory. As a result, the court did not give Bait No. 9.00.6. If defendant was in any way surprised by this, ft was required under the parties' stipulation to object no later than immediately after the instructions were read. It did not do so.

In the face of this record defendant states, somewhat astonishingly, that "[flor reasons not explained on the record, the trial court was willing to give BAJI 9.00.6 had plaintiff proceeded to trial on a risks/benefits design defect theory, but refused to give the instruction on the consumer expectations and failure to warn case... ." The court did not "refuse" to do anything; ft omitted an instruction which ft apparently believed defendant had only requested conditionally. Its reasons were anything but unexplained: the condition under which defendant requested the instruction had ceased to exist. If the court was mistaken, ft was up to defendant to say so, not let the matter pass and then offer ft on appeal as grounds for a retrial.

This leaves defendant's argument that the doctrine embodied in comment *i* and Bait No. 9.00.6 entitled defendant to judgment *as a matter of law.* Defendant cites six motions or memoranda raising related points; none raises this specific argument. Nonetheless, this is the kind of argument which, if limited to its potential as a *complete bar* to liability, we may consider on appeal notwithstanding the failure to raise ft below.

The problem with defendant's many other arguments of similar nature is that they depend on factual predicates, such as package warnings, that do not pertain to the entire period at issue in this suit As a result they raise only a partial defense. If comment *i* actually raised a categorical bar, as defendant now contends, the bar might well extend to the entire period at issue. Defendant's argument fails, however, because to the extent comment *i* reflects California law, ft does not furnish a categorical defense but

a question of fact or multiple questions of fact for the trier of fact

Comment *i* is a gloss on the general rule that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer.... is subject to liability for physical harm thereby caused... ." (Rest.2d Torts, § 402A, subd. (1).) The entire point of comment is to emphasize and enlarge upon the requirement that the

product must be "unreasonably dangerous."FN9 This requirement "was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey and automobiles) would become 'automatically

responsible for all the harm that such things do in the world.' "(*Cronin* i'. .*LB.E. Olson Corp.* (1972) 8 Cal.3d 121, 132, quoting Prosser, Strict Liability to the Consumer in California (1966) 18 Hastings L.J. 9,23.)

In *Cronin, supra,* 8 Cal.3d at pp. *134-135,* the court held that the "unreasonably dangerous" requirement is not part of California's law of strict product liability. This holding remains good law. (See *Barker* r~• *Lull Engineering Co., supra,* 20 Cal.3d 413 at

p. 417; *Brown v. Superior Court* (1988)44 Cal.3d 1049, 1057; *American Tobacco, supra,* 208 Cal.App.3d 480, 489.) Indeed, except as modified by section 1714.45 (see section I, above), ft has been legislatively ratified. (§ 1714.45, subd. (d).) Defendant somehow acknowledges this while still asserting that comment 4 which serves only to illuminate this inapplicable requirement, states the rule applicable to this case. Defendant cites no California case since *Cronin* that has applied the comment or endorsed its application. (Cf.

Harris v. Belton (1968) 258 Cal.App.2d 595, 608; *Cakes* ". £ .L *Dii Pont de Nemours & Co., Inc., supra,* 272 Cal.App.2d 645,

648.)

Not only does comment *i* explicate a rule that is not part of our law, ft does not by its terms support the categorical bar to recovery defendant would have us adopt The comment states that to warrant liability, the product must be "dangerous *to an extent beyond that which would be contemplated* by the ordinary consumer." (Rest.2d Torts, § 402A, com. 4 italics added.) This invites a showing by an injured smoker that while cigarettes may have been generally known or believed to pose hazards, they were in fact far more dangerous than was "contemplated by the ordinary consumer." In arguing otherwise, counsel flatly misrepresents applicable authority. In the reply brief counsel writes, "*Under Comment 4 ft* is not necessary that the ordinary consumer know or understand every possible risk associated with smoking, so long as cigarettes are 'known to be unsafe.' *See American Tobacco,* 208 Cal.App.3d at p.490 (there is 'no requirement... that consumers fully appreciate all the risks involved')." (italics added.) The quoted passage actually states: "As to the second and third claims, there is no requirement *under this statute* [former §1714.45] that consumers fully appreciate all the risks involved in the use or consumption of the products within the purview of *this section.* In order to be covered *by this statute ft* is sufficient that the ordinary consumer knows the product is 'unsafe.' " *(American Tobacco, supra,* 208 Cal.App.3d at pp. 489-

490, fn. *5,* original italics omitted, new italics added.) The court then goes on to say that but for the statute, the situation could well be different: "Evidence that the *risks are greater than those anticz~ated,* either because the product contains unknown dangerous elements or because ft may be used in conjunction with substances that unknowingly increase the risks involved, *could possibly be used to support a claim that the product is defective* under the standards outlined in *Barker v. Lull Engineering Co., supra,* 20 Cal.3d 413 (see Discussion, *ante, at* fn. 4, p. 489).)" *(Ibid.,* italics added.)

Defendant has failed to demonstrate any entitlement to judgment as a matter of law on the authority of comment

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E. Generally Recognized Danger: Comment].

Next defendant contends that it should receive some kind of appellate relief on the authority of comment] to Restatement Second of Torts section 402A, which concerns the effect on a failure-to-warn theory of common knowledge of a product's risks. Defendant does not mention in this context any proceedings in the lower court by which this issue was raised or preserved for appeal. We observe, however, that it was one basis for a motion for judgment notwithstanding the verdict. Even viewing the brief as containing an adequate specification of error, the argument on this point is woefully deficient, as epitomized in the assertion that "because plaintiff knew of and accepted the risks of smoking, PM cannot be strictly liable to her." Plaintiff denied that she "knew of and accepted the risks of smoking" as they affected her, and indeed presented evidence that few people outside the research community and the tobacco industry appreciated the risks of smoking at the time she was becoming "hooked." In the absence of a compelling showing to the contrary, we presume the jury accepted this testimony and otherwise made any findings necessary to reject defendant's factual premise. Defendant's one-page argument on appeal does not include a compelling showing.

IV. FRAUDULENT MISSTATEMENT.

A. Misstatement.

Defendant contends that plaintiff failed to establish two elements of her claims for fraudulent misstatement and fraudulent promise, i.e., a false representation of fact (or actionable false promise) and actual reliance by plaintiff.

As defendant puts it, plaintiff presented "no evidence of a misrepresentation of material fact" and "no evidence of actual reliance or causation."

A claim of "no evidence" is a claim of insufficient evidence to support the challenged findings. One raising such a claim assumes a "daunting burden." *(In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) We *must presume* that the record contains substantial evidence to support every finding necessary to support the judgment. *(In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.) To overcome this presumption, the party challenging a finding "must *summarize the evidence* on that *point ,favorable and*

unfavorable, and *show how and why it is insufficient (Trailer Train Co. v. State Ed of*

Equalization (1986) 180 Cal.App.3d *565,* 587-588.)" *(Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208, italics added.) Where a party presents only facts and inferences favorable to his or her position, "the contention that the findings are not supported by substantial evidence may be deemed waived." *(Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

Defendant makes no attempt to provide a fair summary of the evidence on which the findings of fraudulent misrepresentation and reliance might (and presumptively do) rest. We recognize that the record is exceptionally large, the scope of proof vast, and the limitations on brief length constraining. Fairness might require relaxation of the foregoing requirement if defendant had made a good faith effort to comply with ft by at least identi1~ing the evidence *most* favorable to the judgment Defendant, however, has made *no* attempt to set forth the evidence most supportive of the finding and to "show how and why ft is insufficient." *(Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208.)

Our review of the record satisfies us that there was substantial evidence, which defendant does not cogently dispute for purposes of this appeal, that ft engaged in a conscious, deliberate scheme to deceive the public, and individual smokers and potential smokers (many or most of whom ft knew to be adolescents), about the health hazards and addictive effects of cigarette smoking. The jury could properly find that commencing no later than 1953 and continuing at least until the time of plaintiff's diagnosis, defendant and other cigarette manufacturers acted both in concert and individually to issue innumerable false denials and assurances concerning the dangers of smoking, deliberately fostering a false impression by the public, or more precisely by smokers and prospective smokers, that assertions of health risk were overblown products of puritanical prejudice, that any real hazards had yet to be shown, and that the industry itself was acting and would act diligently to discover the scientific truth of the matter and promptly disclose its findings, good or bad. The jury could also find that plaintiff heard of these false assurances and denials, if only indirectly, and was falsely led to believe, as defendant intended, that there was a legitimate "controversy" about whether cigarettes actually caused cancer or carried any other serious health risks. As a consequence of that information and the distorted judgment brought about by addiction, she was unaffected by reports of adverse health effects because she was unpersuaded they were true or reliable enough to warrant any action by her.

Defendant contends that many of the statements alleged by plaintiff were matters of opinion and thus not actionable. This argument relies on the general rule that statements of opinion will not support an action for fraud, while ignoring the exception on which the jury was instructed, and which it presumptively found applicable to any statements of opinion:" 'Ii W]hen one of the parties *possesses*, or assumes to *possess*, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he

may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, tough ft might be regarded as but the expression of an opinion if made by any other person, is not excused if ft be false.' " (*Harazim* is. *Lynam* (1968) 267 Cal.App.2d 127, 131 quoting *Haserot* is. *Keller* (1924)67 Cal.App. *659,* 670-671.) Further, if a statement ofopinion" 'misrepresents the facts upon which ft is based or implies the existence of facts which are nonexistent ft constitutes an actionable misrepresentation.'~~ (*Id.* at p. 133, quoting *Seeger* is. *Odell* (1941) 18 Cal.2d 409,414.) The jury here was entitled to find that insofar as any of defendant's statements constituted opinions, they implied the existence of superior knowledge as well as a state of facts that did not exist.

B. Reliance and Causation.

Defendant contends that even if plaintiff showed an actionable misrepresentation, she failed to show that she actually and reasonably relied on anything defendant said or failed to say. Likewise defendant suggests that plaintiff failed to show the closely related element of causation.

Defendant incorrectly asserts that "[t]here is no evidence that plaintiff ever saw or heard..

. any... statements by [defendant] (or other cigarette manufacturers) relating to the health risks of smoking." Defendant ignores plaintiff's testimony that while she recalled "listening and seeing things that the Surgeon General was saying," she was also aware "that *the tobacco companies were saying difference"* (Italics added.) Thus, she testified, package warnings never "faze[d] me one way or the other. I wasn't going to give the cigarettes up at that point" The jury was entitled to find that by this time, in her addicted state, plaintiff was easy prey for defendant's disinformation campaign and readily clutched at the industry's caricature of objective inquiry.

Contrary to defendant's implicit contention, plaintiff did not have to prove that she heard these matters directly from defendant, or from any of its coconspirators. It was enough that the statements were, as the jury was entitled to find, issued to the public with the intent that they reach smokers and potential smokers, and that plaintiff, as a member of that class, heard them. As the jury was correctly instructed, "One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material fact will be passed on to another person and influence such person's conduct in the transaction involved."

Rest.2d Torts, § 533; *Geernaert is. Mitchell* (1995)31 Cal.App.4th 601, 605 [summarizing principles and noting that "if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class']; *Mirkin is. Wasserman* (1993) 5 Cal.4th 1082, 1098 [confirming principle but noting inapplicability where plaintiff unaware of misrepresentation]; *Shapiro* is, *Sutherland* (1998)64 Cal.App.4th 1534, 1548 [citing and following *Geernaert]; Committee on Children '~s Teleisision, Inc.* is. *General Foods Corp.* (1983)35 Cal.3d 197,219 - [applying principle to misleading advertisingj; cf. *Gawara is. United States Brass Corp.* (1998)63 Cal.App.4th 1341, 1351, 1355 [indirect reliance not shown by evidence].)

Here defendant's and its coconspirators' innumerable misrepresentations concerning the unsettled state of relevant knowledge, and by implication the unreliability of evidence of a cigarette-cancer link, were made with the intention and expectation that they would circulate among and influence the conduct of *all* smokers and prospective smokers. They were passed topl~~ who knew that while the Surgeon General was saying one thing, the industry was "saying different" This brings her within the cited rule.

Defendant attempts to characterize and then attack plaintiff's fraud theory as "fraud on the market," a concept developed under federal securities law, which the court in *Mirkin, supra,* 5 Cal.4th 1082, refused to import into our common law of torts. "Fraud on the market" has nothing to do with this case. Its essential principle is that an investor in a security, the price of which has been influenced by fraud, may be deemed to have relied on the fraud. (*Id* at. p. 1089, citing *Basic Inc. is. Leisinson* (1988) 485 U.S. 224,241-247, 250.) Neither that rule nor its context-specific rationale has any bearing on fraud contended to have been practiced on a vast group of consumers, causing many of them to sustain personal injuries. The facts of this case might be more accurately called "fraud on the public," but even that ft is misleading. Plaintiff herself was an intended target and victim of the fraud, through precisely the mechanisms of transmission intended

by defendant and its coconspirators. Defendant has failed to show any defect in the jury's

verdict on the affirmative fraud claims.

V. BREACH OF EXPRESS WARRANTY.

Defendant contends that plaintiff offered "no evidence of an express warranty," such that the judgment in her favor "on this claim" must be reversed. The gist of this argument is that plaintiff showed no express "affirmation of fact," as distinct from an implication, opinion, or general commendation of goods, of which she was personally aware, or on the basis of which she personally acted.. Defendant also asserts that there was insufficient evidence to establish that any warranty the jury might have found was actually the basis of any bargain between plaintiff and defendant

Defendant has once again failed to meet its burden as a party challenging the sufficiency of the evidence. To cite the most obvious example, defendant relegates to a

footnote plaintiff's simplest evidence of a direct, express warranty from defendant Plaintiff testified that at some point prior to the late 1980s she began to hear that "low-tar cigarettes were better" and that by smoking them "[y]ou wouldn't get as much tar and nicotine." Accordingly she decided to" 'check into this,' "thinking," 'Maybe I'll change from the Reds to the Lights.' "She "did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is ft really true? Is there less tar in this or less nicotine?' ¶ And I was assured at the time that ifI was concerned that, yes, I could switch to the Lights, which presented a real problem, because approximately a month or two after switching to Lights, I went from two packs of cigarettes to three and a half packs of cigarettes a day."

Defendant fails to "show how and why [this evidence] is insufficient" (*Roemer is. Pappas, supra,* 203 Cal.App.3d at p. 208) to establish an express warranty. In a footnote ft mischaracterizes the testimony as confirming only "that *plaintiff wanted to smoke cigarettes with less tar and nicotine,* she could switch to light cigarettes." (Italics added.) We presume the jury did not adopt this interpretation. The least that the testimony reasonably could be understood to mean was that defendant represented to plaintiff that she would take in less tar and nicotine if she switched to Lights. This proved false (the warranty was breached) when (as defendant knew was common) plaintiff simply increased the number of cigarettes she smoked.

Further, even though plaintiff's trial testimony about this conversation was somewhat ambiguous, ft supported an inference that defendant's representative expressly assured plaintiff that Lights eliminated or reduced whatever risks smoking might otherwise pose. That is, the assurance as stated at trial was that switching to Lights would address some unspecified "concern[s]." The jury could infer that the "concerns" discussed were related to what plaintiff said motivated the call, i.e., that she had heard "low-tar cigarettes were better." By "better," the jury could infer,

plaintiff meant "healthier."

Even if defendant had carried its burden of showing that the record lacks substantial evidence of an express warranty, no prejudice appears. We see no reasonable likelihood that the jury's consideration of this theory had any effect on its findings on other matters, notably the fraud and strict liability claims.

VI. FRAUDULENT CONCEALMENT.

Defendant contends that the jury verdict for plaintiff on the issue of fraudulent concealment cannot be sustained because (1) plaintiff and the public were aware of the health risks of smoking at all relevant times; (2) "plaintiff did not prove" that she relied on any mistaken beliefs that would have been dispelled by the posited disclosures; and (3) any reliance would have been unreasonable as a matter of law.

Again defendant shirks its burden as a party challenging the sufficiency of the evidence to support a particular finding in this case the jury's implied finding that neither plaintiff nor the public was aware of, or adequately appreciated, the health risks of smoking. Defendant singles out two favorable passages of deposition *testimony* and uses them to assert that plaintiff "was aware of the material fact that she claims was not disclosed to her that smoking cigarettes can damage one's health." In the first plaintiff answered affirmatively the question whether "throughout the time that you smoked, you had *heard that there were risks* associated with smoking, *or* you had heard people say things about smoking and health; you just didn't want to believe them." (Italics added.) In the second she acknowledged that there was a warning on every pack she picked up after 1966. Neither of these passages constitutes a binding or compelling admission that when plaintiff began smoking in 1961, or at any particular time thereafter, she knew of, understood, or appreciated the

dangers of cigarrette smoking. In any event, citing favorable testimony is not enough; defendant must cite the evidence supporting a *contrary* finding the finding presumptively made the by the jury and show "how and why it is insufficient." (*Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208.)

Plaintiff testified, among other things, that when she began smoking at age 15 she did not "understand there were dangers about smoking cigarettes." Defendant disregards this particular question and answer, but goes on to assert that plaintiffs trial testimony "is simply not credible." It then singles out testimony in response to the question, "When were you first aware that cigarette smoking could cause lung cancer?" Plaintiffs actual response was, "I think my first complete awareness that cigarette smoking could cause lung cancer was when a doctor came in and told me that I had lung cancer." She testified that she was "baffled" by this information, which she "made them repeat to me several times." She continued: "I just know that I must have seen the warnings, but to be fully aware or believe that this really did cause this, it didn't register in my brain." She was inclined to believe, and preferred to believe, that her lung cancer was the result of asbestos exposure, and she repeatedly questioned doctors about this alternative possibility. So complete was her "denial," as she repeatedly described it, that even after her diagnosis she still sought ways to disbelieve it, in part to keep open the option of taking up smoking again some day. Thus when a friend brought to her attention a report that cigarettes contained ammonia a substance to which plaintiff had a conditioned aversion based on a childhood trauma plaintiff denounced the report as" 'some kind of propaganda against the tobacco company.

We see nothing in this testimony that permits us to substitute our own judgments of credibility for those of the jury. Based on this and other evidence, the jury was entitled to find that plaintiff, first because of her youth and inexperience and then because of her addiction, *did not*

believe the package warnings but thought all information about the health risks of smoking was "propaganda" against the tobacco companies.

Nor will we debate the evidentiary minutiae over whether the *public* adequately appreciated the health risks of smoking to excuse defendant from a duty to disclose. Instead we will presume in support of the judgment that the jury found on substantial evidence that even if there was ample information in the public domain to convince reasonable observers of the hazards of smoking, defendant and its fellows deliberately interfered with the *assimilation* of that information, particularly by smokers and prospective smokers. It was this class to whom defendant presumably owed a primary duty of disclosure. Nonsmokers were far less directly affected by the issue.

At least one of the cases cited by defendant on this subject and the only California one actually supports an argument in favor of the judgment. In *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th *583, 587,* fn. 3, the court noted that tobacco had long had detractors but acknowledged that much of the opposition seemed to rest on concerns of morality or aesthetics, not on any demonstrated health hazard. The court cited and defendant apparently placed in evidence here King James I's famous 1604 "Counterblaste to Tobacco," in which he pronounced smoking "[a] custome loathsome to the eye, hatefull to the Nose, harmefull to the brain, daungerous to the Lungs, and in the blacke, stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomless." By the late nineteenth century, as the *Wawanesa* court observed, smoking had come to be associated with "general licentiousness" and "cheesy dens of iniquity." (60 Cal.App.4th at p. 587, fn. 3.) This history of moral opprobrium provided fertile ground for the tobacco companies' disinformation campaign, since it predisposed addicted smokers (and adolescent presmokers chafing under adult authority) to attribute criticism of smoking to puritanical prejudice rather than sound scientific evidence.

It hardly establishes widespread knowledge among smokers or others that, as a matter of scientific and medical fact, smoking poses severe risks to health.

Defendant likewise fails to carry its threshold burden on the subject of actual and reasonable reliance. Defendant states, "plaintiff effectively admitted that any disclosures by regarding the health risks of smoking would have been immaterial to her decision." But plaintiff plainly testified that she was unmoved by package warnings only because they failed to indicate *how* dangerous cigarette smoking was, and because she knew they did not originate from the companies. As plaintiff said. "[There's a lot of different degrees of danger. It's dangerous to walk across the street. When you're hooked on something and you have the need to have that, you don't you don't listen to that type of warnings. [∂1

Maybe the tobacco company had come out and said: 'Our product is dangerous.' [1] But I was listening and seeing *things* that the Surgeon General was saying that the tobacco companies were saying different" (Italics added.)

Defendant has failed to carry its burden of showing that there was "no evidence," or insufficient evidence, to support each finding necessary to the verdict on the fraudulent concealment theory.

VIL NEGLIGENCE.

We do not address defendant's attack on the jury's finding of simple negligence because the judgment is amply supported by other theories of liability and nothing that occurred in connection with the negligence claim is reasonably likely to have affected the outcome as to those claims.

VIII. PUNITIVE DAMAGES.

A. Sufficiency of Evidence.

Defendant contends that "There Is No 'Clear and Convincing' Evidence to Support the Predicate For Punitive Damages." This is another challenge to the sufficiency of the evidence, and once again defendant has failed to carry its burden on appeal.

The jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, §3294, subd. (a).)" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *(Id.*, subd. (c)(1).)" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *(Id.*, subd. (c)(2).)" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." *(Id.*, subd. (c)(3).)

We assume that the correct standard for review of a finding of oppression, fraud, or malice is as stated in *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60, i.e., whether evidence of sufficient substantiality was presented that a reasonable jury "could find [that] the plaintiff hard] presented clear and convincing evidence on the disputed issue." (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 ["all we are required to find is substantial evidence to support a determination by clear and convincing evidence"]; cf. *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 ["clear and convincing evidence" standard guides only trial court and does not affect reviewing court, which continues to apply the substantial evidence standard]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 911.) Under this standard, however, defendant still bears the burden of fairly summarizing the evidence *favoring* the challenged finding and affirmatively

demonstrating its insufficiency. (See *Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208). Defendant's presentation fails to fairly characterize the most damaging evidence or address its effect.

Defendant first seeks to categorically exclude two bodies of evidence from consideration in support of the punitive damage award. First, it disingenuously asserts that conduct after July 1, 1969, cannot be considered in light of the federal preemption "with limited exceptions" of claims based on conduct after that time. The primary "limited exception" is that the 1969 Act does not affect state law claims for fraud. *(Cipollone, supra, 505* U.S. at p. 528.)

Next defendant asserts that conduct immunized by section 1714.45 should not be considered in support of a punitive-damages award. Such an argument would merit analysis only if defendant raised a concrete possibility that the verdict was infected by consideration of conduct within the specified period. Insofar as defendant contends that the 11-year "immunity window" created by section 1714.45 retroactively and irrevocably deprived conduct predating that window of its potency to support a punitive damages award now that the immunity has been repealed, we reject the contention as lacking any discernible support in law, logic, fairness, or public policy.

Defendant then turns to a critique of the trial court's opinion explaining its denial of defendant's motion to set aside the punitive damages award. The court found the evidence "fully sufficient" to support express or implied jury findings that defendant willfully and consciously marketed its cigarettes to teenagers, violated promises and representations to the public by concealing and suppressing information known to it concerning the addictive and harmful properties of its product, and "affirmatively misled the American public by advertising that there was genuine and legitimate controversy in the scientific community on the subject of smoker health, when in fact there was no such controversy." It is in

response to these points that defendant largely abandons any attempt to fairly summarize or address the evidence underlying the judgment

Defendant asserts that the finding of "targeting of teenagers" rested on the rationale that "Most people who become cigarette smokers begin smoking by age 19,so cigarette companies must target teenagers." This is not a fair characterization of the record or of the trial court's opinion. Defendant attacks various documents cited by the trial court on the ground that they were not shown to have been *authored* by a corporate officer, director, or managing agent But even if we accept this premise which again, is not demonstrated but simply asserted as a fact the primary relevance of these materials was not to show conduct by their authors but as admissions of corporate conduct and circumstantial evidence of the mental state of corporate officers, directors, and managers.FN1O As defendant concedes, the particular document it most vigorously attacks was a draft presentation to defendant's *Board of Directors.* It was not deprived of all evidentiary force by its "draft" status. A "draft" is defined and understood as" [a] preliminary sketch or rough form of a writing or document, from which the final or fair copy is made." (4 Oxford English Dict. (2d ed. 1989) p. 1008.) From the existence of a draft, the existence of a "final fair copy" may be reasonably *inferred.* And where a draft document is relevant for its *central theme* (rather than some incidental feature), ft may be inferred that the theme survived into any final version.

Defendant offers the notion that marketing its products to "teenagers" does not establish reprehensible conduct because 18 and 19-year olds are "teenagers" who may lawfully purchase and consume cigarettes. The argument is unsound. Moreover none of the documents cited by the trial court limits itself to 18 and 19-year olds. They discuss smoking habits and "market penetration" among children as young as 12 without the slightest acknowledgment of legal niceties such as defendant now asserts. One

document reviews the history of Marlboro's success and the business risks posed by a coming decline in the number of teenagers, and includes the statement, "Because of our high share of the market among the *youngest* smokers, Philip Morris will suffer more than the other companies... ." (Italics added.)

Defendant asserts that its attempts to prevent the official classification of nicotine as a "drug" cannot support an award of punitive damages. Defendant directs us to no indication that plaintiff the trial court, or the jury placed any reliance on such conduct. It is true that plaintiff played a videotaped excerpt from testimony before Congress in which a Philip Morris executive apparently stated that he did not believe nicotine to be addictive. Elsewhere in its brief defendant contends that this evidence was inadmissible. We do not decide the question because we do not think there is any significant possibility that ft affected the outcome.

Defendant contends that its failure to disclose that cigarettes are addictive does not support a punitive award because "it is, at bottom, a quibble over definitions." If so, it is a quibble of which the tobacco industry is the chief author and beneficiary. The question is not whether the term "addictive" applies to cigarettes in some narrow medical sense but whether a reasonable effort should have been made to bring home to defendant's mostly teenage "starters" market the extreme difficulty they were likely to encounter in any future attempt to~p smoking. To borrow language used in 1965 congressional hearings, "For many people, the choice to smoke, once it has been made, may as a practical matter be irrevocable." (Cigarette Labeling and Advertising Hearings before Sen. Coin. on Commerce on Sen. Nos. *559* and *547*, 89th Cong., 1st Sess., at p. 500 *(1965).)*

We have examined defendant's remaining points concerning the evidence of oppression, fraud, or malice, and find them to be insufficient to carry defendant's

burden of showing that the finding on that subject was marred by error.

B. Size of Award.

Defendant contends that the punitive damages award is excessive for two interrelated reasons: first, that ft was the product of passion and prejudice, and second, that the objective factors by which such an award is reviewed on appeal all point toward a finding that ft exceeds the amount necessary and proper to punish and deter. Defendant invokes California authorities applying the statutory and common law of this state, and federal authorities holding that punitive damage awards implicate constitutional concerns.

Under California law, a punitive damage award may be reversed as excessive "only if the entire record, viewed most favorably *to* the judgment, indicates the award was the result of

• passion and prejudice." *(Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th 1645, 1658.) "The purpose of punitive damages is a public one to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers. The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deference. The California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.] The wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" *(Ibid.)*

In addition, 'The Due Process Clause of the Fourteenth Amendment [to the United States Constitution] prohibits a State from imposing a' "grossly excessive"' punishment on a tort feasor." *(BMW of North America, Inc. 's'. Gore* (1996) 517 U.S. *559, 562 (BMW).)* This constraint apparently rests on issues of notice. *(Id.* at p. *574:* ["Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity

- of the penalty that a State may impost"].) It is at least arguable, and we assume for purposes of our analysis, that in assessing whether an award comports with these constitutional principles, we must review the trial court's determination de novo. *(Cooper*

- *Industries, Inc. 's'. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, ___ [121

S.Ct. 1678, 1683, 1685-1686] *(Cooper Industries)* .)FN11 The factors to be considered are (1) the degree of the defendant's culpability, i.e., the reprehensibility of his or her conduct, (2) the ratio between the punitive award and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. *(Cooper Industries, supra,* 121 S.Ct. at pp. 1685-1686, 1688; see *BMW~, supra,* 517 U.S. at p. *575.)*

Addressing the constitutional issues first, we do find defendant's conduct as reflected in the present record reprehensible. The record reflects that defendant touted to children what ft knew to be an addictive and cumulatively toxic product while doing everything ft could to prevent addicts and prospective addicts from appreciating the true nature and effects of that product. The expected and intended result of this conduct was that millions of youngsters were persuaded to, and did, enslave themselves to a habit that was likely to, and did, bring

many of them to an early loss of the enjoyment of life, illness, and death. We agree with the jury and the trial court that only a very substantial award was sufficient to reflect the moral opprobrium in which defendant's conduct can and should be held.

Nor do we find the award "grossly excessive" by virtue of the 17:1 ratio between punitive damages and compensatory damages. While acknowledging the absence of any "bright line" mathematical test, defendant cites dictum from *Pac{flc Mut Life Ins. Co. v. Haslz~* (1991) 499 U.S. 1,23-24, to imply that a 4:1 ratio between compensatory and punitive damages may approach some sort of per se constitutional line. The court's concern was fueled by two points defendant neglects: the award was also "200 times the out-of-pocket expenses" incurred by the plaintiff and "much in excess of the fine that could be imposed for insurance fraud." *(Ibid.)* Moreover, in *TXO Production Corp. v.*

Alliance Resources Corp. (1993) 509 U.S. 443, the court sustained a punitive award of $10 million, *526 times* the $19,000 actual damages award. *(Id.* at p. 453). The "shock" of this disparity, observed the court, "dissipates when one considers the *potential* loss to [the plaintiff] ... had petitioner succeeded in its illicit scheme." *(Ii* at p. 462, italics added.) The court held that even if the potential losses were fixed as low as $1 million- resulting in a 10:1 ratio of punitive to potential damages the disparity would not" 'jar one's constitutional sensibilities.' "*(Id.* at p. 462, quoting *Has4p,.* 499 U.S. at p. 18.)

Defendant notes that the court in *BMW* considered, as a guideline to the soundness of the punitive award, *statutory* penalties for the misconduct at issue. The same is true, as we have observed, in *Pacific Mutual.* Seeking support in this approach here, defendant cites California statutes imposing penalties of no more than $6,000 for furnishing tobacco products to persons under 18. (Bus. & Prof. Code, § 22958 [civil penalty from $200 for first offense to $6,000

for fifth offense]; Pen. Code, § 308 [penal fine of $200 for first offense up to $1,000 for third offense].) Defendant also cites the 1969 Act, which allows penalties up to $10,000 for violating its provisions. (15 U.S.C. § 1337.) We think the argument under the state statutes backfires. Assuming plaintiff smoked for three years before reaching the age of 18, and assuming defendant (by its own analogy) furnished cigarettes to her every day of that time, its conduct would seemingly constitute nearly 1100 violations of the two California statutes cited. Assessing the maximum civil penalty of $6,000 would yield a total penalty of $6.6 million dollars. The penalty would be much higher if the statute were viewed as permitting each *cigarette* furnished to serve as the predicate for a distinct violation. Furthermore, defendant overlooks the exposure of every person in this state to civil penalties of $2,500 per violation for any act of "unfair competition" (Bus. & Prof. Code, § 17206), which includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" *(id.,* § 17200). This statute could seemingly be applied, by analogy to defendant's argument, to sales of cigarettes topl~~ not only when she was a minor but throughout her 35-year smoking history.

Moreover, as we have noted, the Supreme Court's interest in examining statutory penalties stems from concerns about *notice* as ft bears on the fundamental faimess, or unfairness, in imposing a specific award. Defendant has long known that ft was at risk for civil liability based upon its products, and we may readily infer that ft also knew ft was at risk for liability under traditional common-law concepts like fraud, which at the time of most of the relevant conduct would support virtually unlimited punitive damage awards. The trial court quoted from a 1980 internal document reporting that defendant's attorneys had been saying that" 'the entire matter of addiction is the most potent weapon a prosecuting *[sic]* attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as" free choice" if the person

was "addicted."' "Defendant obviously knew that the risks of pursuing its course were very high indeed. It nonetheless pursued that course. That ft can be compelled to disgorge a tiny fraction of the resulting profits as a punitive award does not offend our conscience, constitutional or otherwise. We detect no constitutional infirmity in the award.

Turning to state-law review for "passion or prejudice," we observe that in addition to the reprehensibility we have already discussed, defendant's vast financial resources, presumably built largely on the very conduct here at issue, justified a very large award. The trial court stated, and defendant does not contest, that defendant's net worth at the time of the award was over $3.4 billion. As the court noted, a $25 million award represents less than 3/4 of one percent of that sum. Defendant asserts that this factor does not answer a federal constitutional objection, but we do not cite it in that context. The award is of sufficient size to "sting," without posing any danger that it will "kill." (*Troensegaard v. Silvercrest Industries, Inc., supra,* 175 Cal.App.3d 218 at p. 227.)

Defendant contends that the award is excessive in light of the potential for other actions like this one in which punitive damages may also be awarded, magnifying the deterrent effect. Multiplicity of awards is a factor that may be weighed, and on proper presentation presumably should or must be weighed, in fixing a punitive damage award. "Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter." (*Stevens v. Owens-Corning Fiberglas Corp., supra, 49* Cal.App.4th at p. 1661.) "The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Ibid.*; accord, *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d *952, 969,* disapproved on other grounds in *Adams v. Murakami* (1991) *54* Cal.3d *105,* 115-116; see *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 667; Rest.2d Torts, § 908,

com. *e; 6* Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1328, p. 786.)

In its careful evaluation of punitive damages here, the trial court expressly cited the possibility of future awards as one reason to reduce the jury's award from *$50* million to *$25* million. The court predicted that numerous suits would be filed against defendant, that the costs of defense and any resulting judgments would be substantial, that punitive damages "undoubtedly will be requested and may well be awarded in many such suits," and that this reinforced the court's conclusion "that $25 million is enough to punish and deter in the present context." Defendant's argument is that the award should have been reduced even further. We can find no fault in the trial court's reasoning on this point. The extent to which other plaintiffs may succeed remains to be seen. To predict the success rate of such future litigation would be purely speculative, and the trial court might have been justified in refusing to give that factor any weight whatsoever. As it stands, defendant has shown nothing more than "the mere possibility of a future award in a different case,"

which of itself "is not a ground for Ilfurther reducing] the award in this case.... If defendant] should be confronted with the possibility of an award in another case for the

same conduct, it may raise the issue in that case." (*Grimshaw v. Ford Motor Co.* (1981)

119 Cal.App.3d *757*, 812; *Stevens v. Owens-Corning Fiberglas Corp., supra, 49*

Cal.App.4th at pp. 1661-1662; *Vossler v. Richards Manufacturing Co., supra,* 143

Cal.App.3d at pp. 968-969.)

Insofar as the award is challenged under California law, we cannot say that, as reduced by the trial court, it is the

product of passion and prejudice. Reviewing it de novo under federal constitutional principles, we cannot say that it was "grossly excessive."

The judgment is affirmed.

We concur:

Reardon, P.J.

Kay, J.

Sepulveda, J.

Trial Court: Trial Judge: Counsel for Appellant:

Counsel for Respondent: San Francisco County Superior Court

Honorable John Munter

Gerald V. Barron

Lucy B. Mason

Shook, Hardy & Bacon L.L.P.

M. Laurence Popofsky

Curtis M. Caton

David B. Goodwin

Wayne Stephen Braveman

Heller Ehrman White & McAuliffe

Daniel U?ham Smith

Ted W. elletier

Law Offices of Daniel U. Smith

Harry F. Wartnick

Madelyn JQy ce Chaber

Wartnick, Chaber, Harowitz, Smith & Tigerman

REFERENCES:

1 All future references to former section *1714.45* are to the version in effect from January

1, 1988, to January 1, 1998.

2 We use the term "addicted" as shorthand without meaning to declare as a judicial fact that tobacco is addictive in any sertled medical sense. That question is not before us. The jury here presumptively found that tobacco was addictive in a sense supported by the evidence and supportive of the judgment.

3 The same or related issues are currently pending before the Supreme Court in at least five cases: *Myers v. Phi/lip Morris Companies, Inc.* (9th Cir. 2001) 239 F.3d 1029, certification accepted March 21, 2001 (S0952 13); *Souders v. Philip Morris Inc.* (2001) * Cal.App.4th * ~lO4 Cal.Rptr.2d 821], review granted, May 16, 2001 (S096570); *Naegele v. R. £Reynolds* (2000) * Cal.App.4th * [96 Cal.Rptr.2d 666], review granted, Oct. 18, 2000 (S090420); *Bowyer v. Philip Morris, Inc.* (Mar. 28, 2001) B145673 [nonpub. opn.], review

anted June 13, 2001 (S097441); *Reynolds v. Phi/i Morris, Inc.* (July 10, 2001) P31418≤0, [nonpub. opn.], review granted, October /6, 2001 (S099989). In addition, as this

opinion was being prepared for filing, the Fourth District published *In re Tobacco Cases II* (Oct. 25 200 F) Cal.App.4th

[2001 Cal.App. LBXIS 841, 2001 C.D.O.S. 9195]. The court tlkere coii&fuded that nothing in the statute "unmistakably express[ed] any legislative intent that the amended statute be applied retroactively." *(Id.* at p. __ [2001 Cal.App. LBXIS 841, *4748; 2001 C.D.O:S. at p. 9201].) Our study of the statutory language has led us to the contrary conclusion.

4 Defendant's claim of erroneous admission of evidence is not cognizable in the absence of an objection below on the ground now asserted. (Bvid. Code, § 3~3, subd (a).) Defendant's statement that the evidence was admitted "despite objection is somewhat disingenuous:

the cited objections had nothing to do with the issue now under discussion. Defendant's complaint that the trial court should have instructed the jury to disregard evidence of conduct supposedly immunized by the statute founders on the acknowledged fact that no such instruction was proffered or re quested. Nor does the cited authority *(Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334) support defendant's claim that the court was required to give such an instruction on its own motion. Finally, in ruling on post-trial motions the trial court was entitled to consider objectionable evidence to which no objection was asserted. (3 Witkin, Cal. Evidence (4th e cL2O OQ) Presentation at Trial, § 393, p. 484; Cal. Law Rev. Coin. com., West's Ann. Bvid. Code, § 140.)

5 Defendant has burdened an already mammoth record with vast quantities of unpublished authority from other jurisdictions. Our own unpublished op inions are not authority and parties are forbidden to cite them as such. (Cal. Rules of Court, rule 977(a).) Nor does a written opinion by a California trial court possess precedential value. *(Santa Ana Hospital Medical Center v. Belshe~* (1997) 56 Cal.App. 4th 8719, 831; see *Neary v. Regents of University of ~J[1]alfornia* (1992) 3 Cal.4th 273, 282, quoting *Fenske v. Board of Administration* (1980) 103 CaI.App.3d 590, 596 ["

'[T]riaF courts make no binding precedents.' "].) The federal district courts are trial courts, and their opinions are subject to this same principle. (*Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th *15,* 20, fn. 8.) Indeed, on questions of state law *no* federal court opinion is binding on us even that of the United States Supreme Court. (*East Quincy Services Dist. v. General Accident Ins. Co.* (2001) 88 Cal.App.4th 239, 246.)

6 This analysis makes it unnecessary to address plaintiffs argument that because her claim "accrued" after the effective date of the 1998 amendments, application of those amendments here would not be retroactive.

7 As italicized in defendant's brief, the challenged instruction provided in part: "[B]ecause of federal law, *cind except only as stated below,* you may not base any findings of liability on a determination that (a) defendant Philip Morris, through its advertising or promotional practices, neutralized, minimized or undermined the effect of the federally -mandated warnings after July 1, 1969, or (b) defendant Philip Morris, after July 1, 1969, failed to disclose, or concealed or suppressed, information about the health risks of smoking. [∂1 *The federal law does not limit the potential liability of Philip Morris against claims* that it made misrepresentations about the health risks of smoking or *that it conspired with other cigarette companies to conceal A suppress, or misrepresent information regarding the health effects of smoking."*

8 We do not consider two related questions, not presented in *Soule,* concerning the applicability of its holding where (1) the ordinary user of a product may be predisposed by psychological and pharmacological factors associated with its use to perceive its risks di fferentl~ than do other members of the public, and (2) the "minimum safety" of the product is a matter of public controversy as to which consumers have been exposed to a variety of conflicting opinions, assertions and sophisticated propaganda techniques intended to neutralize any perception of

danger.

9 Comment *i* provides: "i. *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the pro duct makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for a11 consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of full el oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

10 The documents cited by the trial court amply showed knowledge by defendant that its Marlboro cigarettes were particularly successful among children. Another document shows that this was no accident ~but the deliberate result of symbols consciously manipulating the adolescent mentality: "Marlboro's traditional area of strength has, of course been young people because the principal message its imagery delivers is independence, or young people who are always being told what to do, the Marlboro man says, 'I'm in charge of life. ¶_.... iə] [T]he maturity of the Marlboro man makes him representative of the idea

smoker self confident and secure."

11 *Cooper Industries* held that a federal appellate court had to address the excessiveness issue de novo where the district court had refused to set aside an award of punitive damages. The court indicated that an "abuse of discretion" standard would be consistent with due process if the award under scrutiny was made under, and in compliance with, a state law fixing a *statutory ceiling* for punitive damage awards. *(Cooper Industries, supra,* [121 S.Ct. at p. 1684, fn. 6], citing *BMW, supra* 51 'TU.S. at pp. 614-619 [app. to dis. opn. of Ginsburg J.].~ Later the court indicated that the novo review might not be ,required where state law 'tied the award of punitive damages more tightly to the jury s finding of compensatory damages." (*Cooper Industries, supra,* [121 S.Ct. at p. 1687, fn. 13].) "This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (e.g., treble damages)." *(Ibid.)* We assume for present purposes that California has no comparable statutory ceiling, and that de novo appellate review is therefore mandated under *Cooper Industries.*

No. 01-15387

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAHER W. SOLIMAN,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
PHILIP MORRIS INCORPORATED, et al.	)
	)

Defendants-Appellees.

)

No. 01 -15387
DC - CV - 00-01530-MJJ
Northern California
(San Francisco)

APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA HONORABLE MARTIN J. JENKINS JUDGE NORTHERN DISTRICT OF CALIFORNIA NO. 00-1530-MJJ

PROOF OF FILING AND SERVICE BY MAIL

MAHER W. SOLIMAN, JD
1112 LARKIN STREET, NO. 405
SAN FRANCISCO, CALIFORNIA 94109
TELEPHONE: (415) 776-3998
FACSIMILE: (415) 771-1350

FILED BY: MAHER W. SOLIMAN
APPELLANT IN PRO PER

State of California

County of San Francisco

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Francisco, over the age of eighteen (18) years and not a party to the within action or proceeding; that my address is 1112 Larkin Street, No. 405, San Francisco, California 94109; that on December 2nd, 2002, I served the attached documents entitled:

Appellant's Petition for Rehearing En Banc (FRAP 35)

By depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in First Class Mail, via the United States Postal Service as indicated.

Office of the Clerk (Original plus 50 copies)

U.S. Court of Appeals - Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, California 94119-3939

Gabrielle B. Handler, Esq.
Shook, Hardy & Bacon LLP
333 Bush Street, Suite 600
San Francisco, California 94104-2828
Attorneys for Philip Morris Incorporated; Philip Morris Companies, Inc.; and
Lorillard Tobacco Company

Thomas G. Scarvie, Esq.
Howard, Rice, Nemerovski, Canady, Falk & Rabkin LLP
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Attorneys for RJ Reynolds Tobacco Company

Susan E. Foe, Esq.
Dryden, Margoles, Schmaneck, Kelly & Wait
One California Street, Suite 2600
San Francisco, California 94105
Attorneys for Liggett Group, Inc.

Shelley L. Brittman, Esq.
Sedgwick, Detert, Moran & Arnold
One Embarcadero Center, 16th Floor
San Francisco, California 94111-3628
Attorneys for Brown & Williamson Tobacco Corporation individually and as successor by merger to The American Tobacco Company.

Steven H. Bergman, Esq.
Simpson, Thacher & Bartlett
10 Universal City Plaza, Suite 1850
Los Angeles, California 91608
Attorneys for BAT~ Industries P.LC.

Daniel J. Friedman, Esq.
Loeb & Loeb LLP
1000 Wilshire Boulevard. Suite 1800
Los Angeles, California 90017-2475

Attorneys for Council for Tobacco Research - U.S.A., Inc.
Mary C. Oppedahl, Esq
Crosby, Heafey, Roach and May RC.
1999 Harrison Street, 22nd Floor
Oakland, California 94612
Attorneys for Tobacco Institute, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of December, 2002, at San Francisco, California

MONICA VOGEL